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EDITOR'S NOTE

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tatus: GRANTED

ocketed:
ugust 30, 1985

Title: New York, Petitioner
v.
P. J. Video, Inc., dba Network Video, et al.

Court: Court of Appeals of New York

Counsel for petitioner: Arcara, Richard J., DeFrarks, John J.

Counsel for respondent: Cambria Jr., Paul John

ntry	Date	Note	Proceedings and Orders
1	Aug 30 1985	G	Petition for writ of certiorari filed.
2	Sep 17 1985		Five video cassettes received.
3	Oct 2 1985		Brief of respondent P. J. Video, Inc. in opposition filed.
4	Oct 2 1985		DISTRIBUTED. October 18, 1985
5	Oct 21 1985		Petition GRANTED.
			**********
6	Dec 5 1985		Joint appendix filed.
7	Dec 5 1985		Brief of petitioner New York filed.
8	Jan 3 1986		Brief of respondents P. J. Video, Inc., et al. filed.
9	Jan 4 1986		Record filed.
10	Jan 7 1986		SET FOR ARGUMENT, Tuesday, March 4, 1986. (2nd case)
11	Jan 8 1986		Brief amicus curiae of Video Software Dealers filed.
12	Jan 13 1986		CIRCULATED.
13	Feb 22 1986	X	Reply brief of petitioner New York filed.
14	Mar 4 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-363

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

P. J. VIDEO, INC.,
d/b/a Network Video
and James Erhardt,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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(11868)

QUESTIONS PRESENTED

1. Did the New York Court of Appeals err in determining that the United States Constitution requires that a search warrant for video cassettes be supported by a factual showing establishing *more* than probable cause?

2. Did the New York Court of Appeals misinterpret the decisions of this Court by applying in the present case a standard applicable only to seizures constituting a prior restraint?

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TABLE OF AUTHORITIES

In The

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OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

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P. J. VIDEO, INC.,
d/b/a Network Video
and James Erhardt,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINION BELOW

On November 21, 1983, a search warrant was issued by a justice of the Erie County Supreme Court authorizing the search of Network Video and the seizure of ten specifically named video cassette movies. As a result of said seizure, the defendant was charged on November 21, 1983 with five counts of Obscenity in the Third Degree, a class A misdemeanor, pursuant to New York Penal Law §235.05.

A motion to suppress the evidence was brought before the Village Court of Depew by the defendant on January 30, 1984. Following oral argument, the motion to suppress was granted and the charges against the defendant dismissed.

The People appealed this decision to the Erie County Court which on October 3, 1984 affirmed the suppression order below (LaMendola, J.). On November 27, 1984, an Associate Justice of the New York State Court of Appeals granted leave to appeal this case to the Court of Appeals. In an Opinion dated July 5, 1985 that Court with one judge dissenting affirmed the decision of the court below.

JURISDICTION OF THIS COURT

On July 5, 1985 the New York State Court of Appeals determined that a search warrant cannot be issued for the seizure of allegedly obscene materials presumptively protected by the First Amendment to the United States Constitution without a judicial determination that the materials sought are *in fact* obscene. This holding is repugnant to the Fourth Amendment precepts established by this Court. The jurisdiction of this Court is thus invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PENAL LAW

§235.00 Obscenity; definitions of terms.

1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest whether through the medium of reading, observation, sound or in any other manner.

• • •

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

• • •

§235.05 Obscenity in the third degree.

A person is guilty of obscenity in the third degree when, knowing its intent and character, he:

1. Promotes, or possesses with intent to promote, any obscene material;. . .

Obscenity in the third degree is a class A misdemeanor.

NEW YORK STATE CRIMINAL PROCEDURE LAW
§690.35 Search warrants; the application.

• • •

2. The application must contain:

(b) A statement that there is reasonable cause to believe that property of a kind or character described in section 690.10 may be found in or upon a designated or described place, vehicle or person;. . .

§710.20 Motion to suppress evidence; in general; grounds for.

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant;. . .

STATEMENT OF THE CASE

On November 21, 1983 Justice Theodore S. Kasler, Justice of the New York Supreme Court, authorized a warrant for the seizure from the defendants of ten video cassette movies, to wit: California Valley Girls, Taboo II, Taboo, All American Girls, Debbie Does Dallas, Body Magic, Deep Throat, Every Which Way She Can, Filthy Rich, and Little Girls Blue. The warrant was executed on November 22, 1983 at which time one or two copies of each of the specified films, except California Valley Girls and Debbie Does Dallas, were seized.

The defendants were subsequently charged with multiple counts of third degree obscenity at which time they moved in the Depew Village Court for suppression of the evidence seized pursuant to the warrant. On March 23, 1984 following oral argument, suppression was granted.

On appeal, the Erie County Court determined that suppression had been properly granted upon its finding that "the holding of the court below that under New York Law, the issuing magistrate had failed to make an adequate finding of probable cause for the issuance of the warrant because he relied solely upon the affidavits of the police officers without any further investigation or viewing of the materials to be confiscated was not an improvident abuse of discretion" (A-40).

The New York Court of Appeals rejected the suggestion that an issuing magistrate need "view the film or even a part of it before approving a warrant" (A-8, 9); however it affirmed the suppression below upon its determination that the affidavits submitted failed to provide the magistrate with sufficient information to ensure that "the subjective views [of the court] or those of the police do not infringe upon the constitutional rights of citizens" (A-9). It is this decision which forms the basis of the instant petition for a writ of certiorari.

REASON FOR GRANTING CERTIORARI

The New York State Court of Appeals erred in holding that the First and Fourth Amendments to the United States Constitution required suppression of allegedly obscene video cassettes seized pursuant to a search warrant.

This appeal concerns the adequacy of affidavits supporting a search warrant which authorized the seizure of video cassettes believed to be obscene under New York State Penal Law §235.00. It is asserted by the petitioner that the New York State Court of Appeals, in affirming the suppression below, erred in its interpretation of the constitutional principles governing search and seizure in two significant respects. First, the court misinterpreted the appropriate standard to be applied in the evaluation of a search warrant directed toward First Amendment material. Regardless of the items sought to be seized, the requirement placed upon an issuing magistrate is that the information provided in the search warrant application establish probable cause. The court's present mandate, i.e. that the magistrate must determine that the targeted materials are "within the statutory definition of obscenity" prior to issuance is contrary to the dictates of this Court and presents a substantial deviation from accepted Fourth Amendment precepts.

The second error committed below concerns the court's application of a heightened level of scrutiny in the evaluation of the warrant affidavits based upon its recognition that First Amendment materials were the subject of the seizure. Heightened scrutiny is appropriate only in situations creating a risk of prior restraint. In the case at bar wherein both the scope and the execution of the warrant were scrupulously circumscribed and where no restraint was placed upon future sale or rental of any materials, including copies of the cassettes seized, no prior restraint can be said to have occurred. Under these circumstances, the procedure utilized by the court which created a higher standard of review than that applied to non-First Amendment seizures is violative of the determined intent of the Fourth Amendment.

While paying lip service to the probable cause standard established for issuance of a warrant by the federal Constitution, the Court of Appeals set forth the criteria to be used with respect to obscenity seizures as follows:

> "Certainly a screenplay need not be annexed to a warrant application nor need the issuing magistrate view the film or even a part of it before approving a warrant. There must be enough information before him in one form or another, however, to enable him *to judge the obscenity of the film,* not of isolated scenes from it. The affidavits, if that is all that is relied upon, need not describe the full content of the movie but they must contain enough information to permit the issuing magistrate, applying contemporary community standards, to judge the films as a whole and *determine that they are within the statutory definitions of obscenity* and thus are not entitled to constitutional protection" (emphasis added) (A-8, 9).

Notwithstanding the fact that the materials sought to be seized are presumptively protected by the First Amendment, the quantum of proof required to support issuance of a search warrant is not proof beyond a reasonable doubt or even proof by a preponderance of the evidence. Rather, in accord with the Fourth

Amendment, the standard to be applied is whether probable cause exists and, as observed by this Court, "it is clear that 'only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause' " (*Illinois v. Gates,* 462 U.S. 213 at 235, citing *Spinelli v. United States,* 393 U.S. 410 at 419). The determination by the Court of Appeals that a magistrate must be able to "judge the films as a whole and determine that they are within the statutory definition of obscenity" imposes upon an issuing magistrate the burden of deciding for purposes of a search warrant an issue which should properly be determined at trial, i.e. whether the materials being promoted are in fact obscene.

Such requirement has been rejected by the federal courts in several cases, including *United States v. Pryba,* 502 F.2d 391 at 404, wherein the District of Columbia circuit, dealing with a seizure of allegedly obscene material, found that, "the term 'probable cause' . . . means less than evidence which would justify condemnation." In line, the Seventh Circuit in *Sequoia Books v. McDonald,* 725 F.2d 1091, held that, "The slight possibility of a temporary suppression of constitutionally protected sex magazines is not enough to invalidate the warrant under the Fourth Amendment."[1]

Notably in *Sequoia* the appellate court not only allowed the seizure of nine magazines described by affidavit, but it also condoned the seizure of unnamed material identified only as any "magazines, movies and video tapes containing depictions or portion[s] thereof of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse . . .; which has if considered as a whole a predominant appeal to the pruirent [sic] interest and has

[1] See also *Sovereign News Co. v. United States,* 69 F.2d 569 [6th Cir., 1982], *In re Property Belonging to Talk of the Town Bookstore, Inc.,* 644 F.2d 1317 [9th Cir., 1981], *United States v. Espinoza,* 641 F.2d 153 [4th Cir., 1981], *United States v. Middleton,* 599 F.2d 1349 [5th Cir., 1979].

no serious educational, literary, artistic or political value" (Id., p. 1093). Similarly the *Pryba* court allowed seizure based upon a hearsay affidavit which stated only that the sought after films "depict a man and female engaged in sexual intercourse and various other activities by males and males and males and females" (Id., p. 410).

In contrast the affidavits furnished the issuing magistrate in the case at bar described each of the films sought to be seized in a thorough and non-conclusory manner. With respect to the majority's concern that the affidavits did not indicate whether the acts described "constitute all, most or a few of the scenes presented in the films" (A-7), the dissent points out that each affidavit recited that it described the "*content* and character" of the film reviewed. As noted by the dissent, "This statement provided the magistrate with a reasonable basis to infer that the affidavits described most or all of the activities portrayed in each film" (A-22). The affiant's use of the word "throughout" when referring to the occurrence of acts of explicit sex further conveyed the pervasiveness of obscene sexual conduct.

A review of the warrant application (A-51) indicates that each affidavit described numerous acts of deviate sexual intercourse, conceded by the majority to be "patently offensive by any constitutional standard" (A-7). The short duration of the films, viewed in conjunction with the fact that the acts described manifestly consume a substantial time span, underscore the reasonableness of the magistrate's conclusion that the described, successive acts of deviate sexual intercourse dominated each film.

The title of each, the indicated plot and setting, and the fact that the films were advertised by defendants as "adult cassette movies," provided the magistrate with yet additional information from which he could discern the general theme and the serious value, if any.

As observed by the court in *United States v. Middleton,* 599 F.2d 1349, where explicit sex scenes consume a substantial portion of the entire film time and where the film repeatedly emphasizes the depiction of a panoply of sexual conduct and exhibition of genitalia, common sense indicates that there can be little reasonable expectation that such scenes are but fragmented portions of a film which, taken as a whole, has serious literary, artistic, political or scientific value (*Middleton, supra,* p. 1359). In accord with requisite First Amendment protections, the nonconclusory descriptions insured that it was the magistrate and not the police officer who "focus[ed] searchingly on the question of obscenity" (*Marcus v. Search Warrants,* 367 U.S. 717 at 732). When evaluated in light of the probable cause standard promulgated by the federal courts and by this Court in cases involving obscenity, the affidavits at issue must be found adequate.

The court's rejection of the probable cause standard in cases involving obscenity has left the lower courts in New York State without guidance as to what information will sustain a search warrant. Although the court specified that, "a screenplay need not be annexed to a warrant application nor need the issuing magistrate view the film or even a part of it before approving a warrant," (A-8), the court's repudiation of the above scene-by-scene descriptions leaves little alternative to personal viewing by the magistrate. Review by this Court would explicitly denote the required procedure where the First Amendment is involved.

Notwithstanding the heightened scrutiny accorded to warrants involving First Amendment materials by this Court's decision in *Roaden v. Kentucky,* 413 U.S. 496, and *Marcus v. Search Warrants,* 367 U.S. 717, it is submitted that such scrutiny is not warranted by the circumstances of the instant case. As noted by this Court recently in *Maryland v. Macon,* ____ U.S. ____, 105 S.Ct. 2778 at 2783, it is the risk of prior restraint which forms the basis for the special Fourth Amendment protections accorded

searches for and seizures of First Amendment materials. In contrast to the situation presented in *Roaden, supra,* where the Court found that the seizure of a film then being exhibited to the general public presented essentially the same restraint on expression as seizure of *all* the books in a bookstore, or in *Marcus, supra,* where 11,000 copies of 280 publications not specifically identified in a search warrant were seized, the case at bar presents neither a mass seizure nor any other significant prior restraint on activities protected by the First Amendment.

As observed by the dissent, both the scope and the execution of the warrant at issue were closely circumscribed to avoid impermissible interference with constitutionally protected expression. Each of the ten films ordered seized was specifically named and individually described in detail in the warrant. Only those films seized were taken and, in each case, only one or two copies of each cassette were seized. Not only did this seizure not deplete the defendant's supply of similarly classified cassettes as indicated by the stock sheet incorporated into the warrant application (A-56), but there was no showing that the defendants were precluded in any way from restocking the titles removed or from continuing the rental of any movies whatsoever (cf. *Heller v. New York,* 413 U.S. 483).

Importantly, the films taken were seized for evidentiary purposes, not for the purpose of destruction. Any deprivation of the use of cassettes later determined to be not-obscene would thus have been temporary and confined to a time limited by the New York State statutory speedy trial provisions.[2]

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[2] Pursuant to New York State Criminal Procedure Law §30.30(1)(b), the People must be ready for trial within ninety days of the commencement of a misdemeanor criminal action.

It is also noteworthy that the privacy interest affected by the execution of the search warrant in this case was *de minimus*. Not only was the defendant's establishment open to the public for the transaction of business, but the items sought by warrant were presumably freely available to any customers prepared to pay the rental charge. Indeed, as noted in the warrant application, the district attorney's office had previously rented all of the cassettes subsequently seized in order to examine them for a preliminary determination of obscenity. The effect of the warrant, then, was not to facilitate a search, which under these circumstances was unnecessary, but rather the warrant both provided a pre-arrest judicial determination of probable cause with respect to the materials seized, and it enabled police officials to preserve the evidence of obscenity against destruction, tampering, or removal from the jurisdiction.

It appears that the basis for the action taken by the court below was its concern that an affiant's description of First Amendment materials might not comport with the actual content of the films. First it must be noted that no showing whatsoever has been made with respect to the affidavits at issue which would justify such concern. In any event, the possibility that an affiant could, by selective presentation of information, materially misrepresent or recklessly disregard the tenor of material sought to be seized does not warrant suppression on the grounds here presented. The appropriate remedy for such misrepresentation would be review under *Franks v. Delaware,* 438 U.S. 154, not modification of the factual requirements necessary to the issuance of search warrants.

Since the decision below is specifically predicated upon the Court of Appeals' application of federal constitutional mandates, its decision is properly reviewable by this Court. Additionally, as noted by the dissent below, Penal Law §235.00 was adopted with the express purpose of incorporating into New York

law the federal standard of obscenity set forth in *Miller v. California,* 413 U.S. 15, and indeed is identical thereto. Since application of that statute "necessarily entails interpretation of the federal guidelines, . . . it cannot fairly be said that the majority opinion rests upon 'bona fide separate, adequate, and independent, [state] grounds' " (*Michigan v. Long,* ____ U.S. ____ 103 S. Ct 3469 at 3476).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within petition.

Respectfully submitted,

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August 30, 1985.

APPENDICES

APPENDIX A — REMITTITUR OF NEW YORK STATE COURT OF APPEALS

Remittur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

CoCt No. 270
The People &c.,
Appellant,
v.
P.J. Video Inc., d/b/a Network Video and James Erhardt,
Respondents.

The appellant(s) in the above entitled appeal appeared by Hon. Richard J. Arcara, District Attorney, Erie County; *the respondent(s) appeared by* Lipsitz, Green, Fahringer, Roll, Schuller & James, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer, Kaye and Alexander concur. Judge Jasen dissents and votes to reverse in an opinion. Judge Titone took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Depew Village Court, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

[Signature]

Kathryn C. Brown, Deputy Clerk

Court of Appeals, Clerk's Office, Albany, July 5, *1985.*

APPENDIX B — OPINION OF NEW YORK STATE COURT OF APPEALS DATED JULY 5, 1985

[OPINION — This opinion is uncorrected and subject to revision before publication in the New York Reports.]

State of New York
Court of Appeals

CoCt No 270
The People &c.,
Appellant,
v.
P.J. Video Inc., d/b/a Network
Video and James Erhardt,
Respondents.

(270)Richard J. Arcara,DA,Erie County(Jo W. Faber & John J. DeFranks of counsel) for appellant.

Paul J. Cambria,Buffalo, for respondent.

SIMONS, J.

This appeal concerns the very basic issue of what information must be contained in an affidavit supporting a search warrant to authorize the seizure of materials which presumptively are entitled to the constitutional protection of the First Amendment. It arises from proceedings instituted in the Village of Depew Justice Court charging defendants with six counts of obscenity in the third degree based upon their possession of allegedly obscene

video cassette movies in violation of section 235.05(1) of the Penal Law. That statute provides:

> "A person is guilty of obscenity in the third degree when, knowing its content and character, he:
> 1. Promotes, or possesses with intent to promote any obscene material."

After arraignment, defendants moved to suppress the seized films contending that the warrant authorizing their seizure was not based upon probable cause. Justice Court granted defendants' motion and dismissed the informations and County Court affirmed this order. The People appeal by leave of a Judge of this Court. They contend that the Justice Court, a local criminal court, was without jurisdiction to invalidate a search warrant issued by Supreme Court, a superior court (CPL 10.10[2], [3]), and that even if it did have the power to review the Supreme Court warrant it erred in finding that the Supreme Court Justice authorized the warrant without probable cause.

Insofar as the jurisdictional question is concerned, the motion was properly entertained by Justice Court. The Constitution provides that local courts "shall have the jurisdiction prescribed by the legislature" (NY Const, art 6, § 17[a]) and the Legislature has provided that when an information is pending in a local criminal court, as these informations were, a motion to suppress "must be made in such court" (CPL 710.50[c]). Moreover, Justice Court had such jurisdiction even though the warrant was issued by a Supreme Court Justice. CPL 690.05 provides that warrants shall be issued by local criminal courts but the Supreme Court Justice was authorized to issue this warrant because at the time he did so he was exercising preliminary — not trial — jurisdiction of the local criminal court, as the Criminal Procedure Law permits him to do (*see*, CPL 10.10[3][f]). Thus, Justice Court acted properly when it reviewed his probable cause determination (*see, People v Guerra*, ____NY2d____, dec. 5/9/ 85). Whether it is wise for a Village Justice, who may or may not be a

lawyer, to review a Supreme Court Justice's warrant authorizations is a matter for the Legislature.

Turning to the merits of defendants' motion, analysis starts with recognition of the constitutional requirement that no warrant shall issue except upon probable cause (NY Const, art I, § 12; US Const, 4th Amdt.). This requirement was designed to insure that the determination of probable cause (or to use the statutory term, reasonable cause [*see,* CPL 690.10]), to believe that the property is subject to seizure must be made by a neutral magistrate interposed between police officers and the citizenry and exercising a "detached and independent judgment" (*People v Potwora,* 48 NY2d 91, 94; *People v Hanlon,* 36 NY2d 549, 558; *Marcus v Search Warrant, supra*). Before finding probable cause, the magistrate must have before him "the full facts from which inferences might be drawn, the information necessary to determine their reliability" and he must undertake a searching inquiry of them. It is a duty which he may not delegate, in part or in whole, regardless of the qualifications of the person on whom reliance is placed (*People v Potwora, supra,* 94-95; *Lee Art Theater v Virginia,* 392 US 636, *see also, Montserrate v Upper Ct. St. Book Store,* 49 NY2d 306: *People v Abronovitz,* 31 NY2d 160, 164-165; *People v Rothenberg,* 20 NY2d 35, 38; *People v Hughes,* 31 AD2d 235). Moreover, in making that searching inquiry the magistrate is obliged to recognize that First Amendment items are presumptively protected by constitutional guarantees of free speech (*see, Roaden v Kentucky,* 413 US 496). Because their seizure based upon the ideas they contain may constitute a prior restraint, there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs, for example (*Roaden v Kentucky, supra,* 504; *Marcus v Search Warrant,* 367 US 717, 730-731). Thus, in applying the Fourth Amendment to such items, the court must act with "scrupulous exactitude" (*Stanford v Texas,* 379 US 476, 481-485; *see also, Maryland v Macon,* ____US____, 53 USLW 4783, 4784).[1]

Consistent with these rules, the task of the issuing magistrate in this case was not to decide guilt or innocence but to determine in a preliminary way from the information submitted and available to him whether there was probable cause to believe that the material to be seized was obscene within the tripartite definition of the statute[2] (*see, People v Potwora,* 48 NY2d 91, *supra; People v Abronovitz,* 31 NY2d 160, *supra; People v Rothenberg,* 20 NY2d 35, *supra*). Because the record does not indicate whether the magistrate viewed the films or questioned the investigators, we must judge his warrant authorization solely on the allegations contained in the papers submitted to him.

The applications consisted of an affidavit of the sheriff's deputy who rented the ten cassettes from defendants' store and separate affidavits relating to each film executed by an investigator

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[1] The majority have not adopted defendants' contentions and therefore the extensive discussion of them in the dissent is irrelevant (*see,* dissenting opn, pp 4-6). Similarly unnecessary is the inclusion of the full text of the supporting affidavits in the dissent's appendix. The majority do not dispute that the affidavits describe patently offensive sexual acts defined by Penal Law § 235.00[b]. Our disagreement with the dissent concerns only the question of whether the affidavits are sufficient to meet the additional requirements of subdivisions (a) and (c) of the statute and thereby support a finding of probable cause that the statute has been violated.

[2] Section 235.00 of the Penal Law defines "Obscene" as follows:

"Any material or performance is obscene if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience" (*see also, Miller v California,* 413 US 15, reh denied 414 US 881).

from the District Attorney's office who had viewed the films after the deputy delivered them to him for that purpose. In each affidavit the investigator identified the film by title, indicated the time required to view it, 80-90 minutes generally, and described the sexual activity shown in some of the scenes. Each affidavit contained approximately 15-20 typewritten lines describing the film, the descriptions in the two shortest affidavits containing only 11 lines and in the longest one, 27 lines.

Each affidavit recites that the subject film depicts one or more acts enumerated under subdivision b of section 235.00. Many of the scenes described contain explicit sexual activity, patently offensive by any constitutional standard, but the allegations of the affidavits do not indicate whether they constitute all, most or a few of the scenes presented in the films. Thus, some of the affidavits describe only two or three scenes in the movie and others refer to "one scene", "a scene", "another scene", or "a later scene" without any attempt to describe the film as a whole, the continuity of the action or the pervasiveness of the sexual conduct. The descriptions of the action are not supplemented by references to the narrative or dialogue of the films and the affiant attempted to describe the "character" or "theme" of the movies by settings having nothing to do with plot, phrases such as "a middle class white neighborhood", "the home of one of the six girls" or "a high school for girls." He made no attempt to reveal the story line (or lack of one) of the films or demonstrate that their "predominant appeal" was to prurient interest. In short, none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole. Undoubtedly, similar lists could readily be compiled by excerpting descriptions of scenes from books and movies having recognized merit. Stanley Kubrick's "Clockwork Orange" and Federico Fellini's "Satyricon" come quickly to mind.

The dissent contends that this deficiency is cured because the affidavits allege that certain acts occurred "throughout" the

movies (dissenting opn, pp 13-14). Significantly, the word "throughout" appears in only two of the affidavits. But further than that the statements relied upon are conclusory and patently ambiguous. They may be interpreted as alleging that sexually explicit acts are pervasive in the two films described but they may also be interpreted in other, less inculpatory ways. That being so, the magistrate was required to inquire and clarify the affidavits' meaning and the record does not establish that he did so.

We have previously held that the courts should not analyze applications in a grudging or hypertechnical manner when determining whether they meet constitutional standards (*see, People v Hanlon,* 36 NY2d 549, 559, *supra,* and cases cited therein). We do not suggest otherwise now. Certainly a screenplay need not be annexed to a warrant application nor need the issuing magistrate view the film or even a part of it before approving a warrant. There must be enough information before him in one form or another, however, to enable him to judge the obscenity of the film, not of isolated scenes from it. The affidavits, if that is all that is relied upon, need not describe the full content of the movie but they must contain enough information to permit the issuing magistrate, applying contemporary community standards, to judge the films as a whole and determine that they are within the statutory definitions of obscenity and thus are not entitled to constitutional protection.[3] Probable cause cannot be inferred from the title of an hour and a half long film or from the description of a few scenes from it, even when the scenes described portray conduct enumerated in subdivision b of the statute. Indeed, it is precisely the type of personal view of "the clear and present danger" posed by obscenity, such as that expressed on page 10 of the dissent, which makes it mandatory that the court insist on the

[3] The dissent contends that this standard has been "rejected unanimously by the federal courts and by an overwhelming number of sister state courts that have considered it" (dissenting opn, p 2). It fails, however, to cite any authority to support this sweeping generalization.

sufficiency of the material before the magistrate and that he take a "hard look" at it, exercising care to adhere to the proper legal standards so that his subjective views or those of the police do not infringe upon the constitutional rights of citizens. It is the failure of the affidavits in this case to contain sufficient information to permit this which distinguishes it from decisions cited by the People, cases such as *United States v Espinoza* (641 F2d 153, cert denied 454 US 841), in which the supporting affidavits purported to describe every picture in the books to be seized, *United States v Sherpix, Inc.* (512 F2d 1361) in which the affidavit described in explicit detail every scene in the film (*id.*, pp 1368-1369), *United States v Middleton* (599 F2d 1349) in which there was a lengthy affidavit describing the conduct in the film in specific detail (*id.*, 1351-1354), and *United States v Marks* (520 F2d 913, revd on other grounds 430 US 188) in which the affiants were also examined by the court (*id.*, 917).[4] Accordingly, the order of County Court should be affirmed.

JASEN, J. (dissenting):

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[4] The dissent relies on *Sequoia Books, Inc. v McDonald* (725 F2d 1091) and *United States v Pryba* (502 F2d 391). *Sequoia Books* involved an action brought by a store owner against a Sheriff pursuant to 42 USC 1983 because of the seizure of allegedly obscene magazines. The opinion gives few particulars of the warrant application, reciting only that part quoted by the dissent (*see*, dissenting opn, p 16) which it described as the "least unprintable of the descriptions" (725 F2d 1091, 1093). The 1971 *Pryba* case involved a prosecution for shipments of obscene materials in interstate commerce under the broadly worded definition of obscenity contained in that statute. The court found probable cause for the seizure in an affidavit based upon hearsay which "in good taste briefly" alleged only that the film depicted "a man and female engaged in sexual intercourse, and various other sexual activities by males and males and males and females" (*United States v Pryba*, 502 F2d 391, 404, n 89, *supra*). While delicacy and brevity have a place in the world, one would not consider them important or even desirable considerations on a warrant application. While we accord the federal courts the greatest respect, we are not bound by their decisions and insofar as *Pryba* may be interpreted as contrary to our decision, we do not follow it.

In this obscenity case, the majority holds that the five affidavits in question, which describe the content and character of video movies as graphically depicting successive acts of deviate sexual conduct, including incestuous intercourse, oral and anal sodomy, and onanism, are insufficient, as a matter of law, to support a magistrate's determination of probable cause that those video movies were obscene. Because I believe that the materials ordered seized by the magistrate were adequately described in the affidavits, as set forth in full in the appendix to this opinion,[1] I would hold that the magistrate had "enough information before him" to reasonably believe that the video movies were obscene as legislatively defined and, therefore, that the warrant was properly issued.

At the outset, it is important to note that what is before us is not whether the defendants are guilty beyond a reasonable doubt of promoting or possessing obscene material, as that would require a full adversary hearing, but rather, simply whether the magistrate, in issuing the warrant to seize the movies, had probable cause to believe that they were obscene.

The majority today holds, that unless obscenity is unambiguously established by the affidavits in question, a magistrate is incapable of rendering a probable cause determation to issue a warrant for the seizure of sexually explicit films, described in those affidavits, solely for evidentiary purposes. This adopted position has never been advanced by the United States Supreme Court, and has been rejected unanimously by the federal courts and by an overwhelming number of the sister state courts that have con-

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[1] This inclusion of affidavits is necessary to demonstrate what I believe to be the sufficiency of the information contained therein to support a probable cause determination, and is in accordance with the general practice of the courts which have addressed this issue (see, e.g., *People* v *Hobbs*, 375 NE2d 1367, 1370 [Ill App]; *State* v *Tavone*, 482 A2d 693, 697-698, n 2 [RI]; *United States* v *Middleton*, 599 F2d 1349, 1351-1354 [5th Cir]; *United States* v *Pryba*, 502 F2d 391, 410-411 [D.C. Cir], cert den 419 US 1127; *United States* v *Christian*, 549 US 1369, 1370 [10th Cir], cert den 432 US 910.)

sidered it. Thus, in my opinion, the majority has undermined the policies advanced by a rigorous enforcement of the obscenity laws; disregarded traditional principles governing judicial review of a magistrate's determination of probable cause, and blurred the distinction between probable cause and guilt; failed to recognize that the magistrate had reasonable grounds to believe that the affidavits described the content and character of each movie as a whole; and misconstrued the limited purpose of the warrant.

Defendants Erhardt and P. J. Video, Inc. are each charged with six counts of obscenity in the third degree, a class A misdemeanor. The prosecutions stem from investigations of defendants by the Erie County District Attorney's office. David J. Groblewski, a confidential criminal investigator assigned to the Erie County District Attorney's office, and previously a member of the New York State Police for 25 years, reviewed ten video cassette movies which had been rented from defendants by a member of the Erie County Sheriff's Department. The ten video cassette movies were selected from the "Adult Cassette Movie List", which contained a total of 30 films and was printed upon the letterhead of Network Video, the business name under which defendants conducted business. Investigator Groblewski viewed the movies in their entirety and summarized the theme and conduct depicted in each film. Sworn affidavits describing the movies were submitted by Investigator Groblewski, and annexed to the application for a warrant authorizing the search of defendants' premises. On November 21, 1983, Supreme Court Justice Theodore S. Kasler, issued a search warrant which authorized the Village of Depew Police Department to make a search defendants' premises. The warrant specifically authorized a search for the following video cassette movies entitled: "California Valley Girls", "Taboo II", "Taboo", "All American Girls", "Debbie Does Dallas", "Body Magic", "Deep Throat", "Every Which Way She Can", "Filthy Rich" and "Little Girls Blue". The warrant also authorized a search for "any personal papers or documents which tend to identify the owner, leasee [sic], or whomever has custody or control over the premises or vehicle searched or the items seized, and seize said property forthwith". The warrant was based upon the application of Sergeant Scioli, the affidavit of Erie County Sheriff Deputy Costanza, and ten affidavits prepared by Investigator David Groblewski.

As a result of the execution of the warrant on November 22, 1983, the defendants' premises were searched and one or two copies of each of the movies named in the warrant application were seized as evidence for trial, together with certain documents. A sworn itemized inventory statement, dated December 5, 1983 and completed by Sergeant Scioli, clearly indicates that only one or two copies of each cassette tape named in the warrant application were seized. By order dated December 5, 1983, Justice Kasler directed that the seized property be temporarily retained, in the furtherance of justice, pursuant to CPL sections 690.05 through 690.55. While the ten films named in the warrant application were seized, defendants were charged with promoting obscenity only with respect to five of those films, to wit: "Taboo"; "All American Girls"; "Debbie Does Dallas"; "California Valley Girls"; "Taboo II".

Defendants made an omnibus motion before Depew Village Court seeking, *inter alia,* suppression of the seized films. A review of defendants' affidavit in support of the omnibus motion, and arguments of defense counsel advanced at the suppression hearing, reveal that the sole ground upon which defense counsel sought suppression was that due to the magistrate's failure to personally view the films in question, the warrant was constitutionally infirm. Paragraph 73 of defendants' affidavit contended: "Thus, it is clear that under New York Law before a search warrant may be issued regarding materials presumptively protected under the First Amendment, which the video tapes in this case indisputably are (*Interstate Circuit* v *Dollar,* 390 US 676 [1968], *Kingsley Picture Corp.* v *Regents,* 360 US 684 [1959]; *Jo-*

seph Burstyn, Inc. v *Wilson,* 343 US 495 [1952]; *People* v *Monserrate,* 49 NY2d 306), two distinct procedures must be engaged in by the issuing magistrate *prior* to the authorizing search warrant: (a) the issuing magistrate must himself personally review the facts (i.e., the materials themselves) upon which he is called to render a judgment of probable cause; and (b) the inquiry must 'focus searchingly' on the issue of 'obscenity'." Paragraphs 74 and 75 of the affidavit clarified the constitutional flaw perceived by defense counsel: "In this case, it is clear that Justice Kasler *did not* personally review the video tapes but instead unconstitutionally delegated his duty of examining the full facts regarding the films' obscenity to various law enforcement officers. * * * * Here, Judge Kasler allowed Investigator Groblewski to determine whether probable cause existed to believe that the films were obscene — a determination which our Courts have long recognized is a matter of personal taste and *must be* performed by a neutral and detached magistrate, not a law enforcement officer [citations omitted]."

At the motion hearing, held on February 15, 1984, defense counsel reiterated the thrust of his argument: "The procedure is, at least in this state, a magistrate, in order to fulfill that constitutional requirement of prior judicial scrutiny and focus upon that issue, has to look at the film or magazines or material in question." Defense counsel stressed: "Continuously, the Court of Appeals said the magistrate is to look at the particular material * * * *". Finally, defense counsel concluded: "I submit, falling clearly within the doctrine that is the facts, the whole facts have to be presented to the judge and I submit that in this state, at least the law is the judge has to look at the material because otherwise he is delegating his authority, which the Court of Appeals says he can't do." The proposition that the magistrate unconstitutionally delegated his responsibility to conduct a full and searching inquiry by relying upon investigator's affidavits was immediately, and sharply, disputed by the Assistant District Attorney.

By order dated March 23, 1984, the Village Court granted the motion to suppress, and held: "In this instance, it was an investigator assigned to the District Attorney's office who made the allegation that the materials seized were obscene * * * *." The order of suppression was affirmed by County Court, Erie County upon the theory that "[u]nder the circumstances and facts of this case, the court finds the holding of the Court below that under New York law, the issuing magistrate had failed to make an adequate finding of probable cause for the issuance of the warrant because he relied solely upon the affidavits of the police officers without any further investigation as viewing of the materials to be confiscated, was not an improvident abuse of discretion."[2]

I begin my analysis by recognizing that the People of New York, through the Legislature, have declared that the evils of obscenity, reasonably created or advanced by its promotion, justifies such invasion of the freedom of expression as is necessary to avoid the danger presented. Defendants have been charged with multiple counts of promoting obscenity in the third degree (Penal Law § 235.05[1]). Penal Law section 235.05(1) provides that "[a] person is guilty of obscenity in the third degree when, knowing its content and character, he [p]romotes, or possesses with intent to promote, any obscene material." Section 235.00 of the Penal Law defines the word "obscene" in the following manner: "Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sod-

[2] It is only by review of defense counsel's arguments before the suppression court that the holding of the Village Court, that the *police investigator* made the allegation of obscenity, may be understood.

omy,[3] sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience". This definition, added by Chapter 989 of the Laws of 1974, was adopted to conform New York's definition of obscenity to that articulated by the Supreme Court in *Miller* v *California* (413 US 15). (See Memorandum of Approval, Malcolm Wilson, McKinney's 1974 Session Laws of New York, at p 2124.) As Penal Law section 235.00 was adopted with the express purpose of incorporating into New York law the federal standard of obscenity set forth in *Miller,* and indeed is identical thereto, application of that statute necessarily entails interpretation of the federal guidelines. Thus, it cannot fairly be said that the majority opinion rests upon "bona fide separate, adequate, and independent [state] grounds" (*Michigan* v *Long,* ____US____ [decided July 6, 1983, slip op at p 8]; compare *New York* v *Uplinger,* ____US____ [decided May 30, 1984] *[per curiam].*)

The legitimate policies vindicated by vigorous enforcement of obscenity laws have been well explored by the Supreme Court. There exists a social interest in order and morality which is advanced by reasonable governmental restraint over the public distribution and sale of obscene movies. (*Paris Adult Theatre I* v *Slaton,* 413 US 49, 61; *Roth* v *United States,* 354 US 476, 485; *Chaplinsky* v *New Hampshire,* 315 US 568, 572.) This state has made a judgment that the promotion of obscenity has a tendency to injure the community as a whole or jeopardize, in Chief Jus-

[3] Penal Law section 235.00(7) defines "sodomy" as any of the types of sexual conduct defined in Penal Law section 130.00(2). Section 130.00(2) of the Penal Law defines "deviate sexual intercourse" or "sodomy" as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva".

tice Warren's words, the "right * * * to maintain a decent society". (*Jacobellis* v *Ohio,* 378 US 184, 199 [dissenting opinion].) The Legislature does, of course, have the power to make moral, as well as social, judgments. (*People* v *Onofre,* 51 NY2d 476, 494 [Jasen, J., concurring].) Such a judgment was rendered by enactment of laws proscribing the promotion of obscene materials. The underlying social and moral purpose of New York's restriction upon the promotion of obscenity was highlighted by Judge Scileppi, when he stated: "It is regrettable that freedom of expression — one of our most cherished liberties — is perverted by those who profit from the salacious and obscene at the expense of decency and morality, as a spurious rallying cry to defeat the high purpose contained in our obscenity laws. Obscenity is striking a telling blow at community decency and morality everywhere with impunity." (Scileppi, *Obscenity and the Law,* 10 N Y Law Forum 297, 305 [1964].)

New York's obscenity laws further serve to protect the participants in the *visual* depiction of sexual conduct. (*New York* v *Ferber,* 458 US 747, 764, revg 52 NY2d 674; see Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography,* 7 Harv Women's L J 5, 18-23.) The Supreme Court has recognized that there exists a qualitative distinction between the *visual* depiction of sexual conduct and the printed description of such conduct. (*New York* v *Ferber,* 458 US 747, 764, *supra.*) A state has a heightened interest in the regulation of the photographic portrayal of sexual conduct since it is necessarily connected to participatory conduct of actual parties. The visual depiction of sexual conduct presents the real potential for physical and psychological harm to the participants. In *California* v *LaRue* (409 US 109, 117), the Supreme Court, speaking through Justice Rehnquist, underscored the vital difference between conduct and printed description: "* * * as the mode of expression moves from the printed page to the commission of public acts that may themselves violate penal statutes, the scope of permissi-

ble state regulation significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the state has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'." The regulation of visually depicted obscenity limits the distribution of materials produced by conduct or action harmful to the participants therein. It is thus unrealistic to suggest that the regulation of obscenity is merely to limit the dissemination of offensive ideas. The promotion of obscenity for profit creates and advances a clear and present danger to the participants in the movies, as well as to women generally resulting from conceivable instances where a viewer of such films seeks, by compulsion, to simulate that which he has viewed.[4] When this court imposes additional burdens upon the magistrate and law enforcement personnel, and thereby disregards the probable cause standards utilized by virtually every other American court, the legitimate policies of protecting the community, the participants in visually depicted obscenity, and women generally, are unnecessarily undermined.

Applying these principles, it is necessary to review whether the magistrate erred in issuing the search warrant. It is unquestioned that in situations in which the materials to be seized may be entitled to protection under the First Amendment, the requirements of the Fourth Amendment should be scrupulously honored. (See *Zurcher* v *Stanford Daily,* 436 US 547, 564-565; *Stanford* v *Texas,* 379 US 476, 485, reh den 380 US 926; *Marcus* v *Search Warrant,* 367 US 717, 732-733.) While it can be said that the Supreme Court has not provided clear guidelines in determining probable cause for obscenity, nevertheless, there is certainty that First Amendment due process requires that a focused judicial de-

[4] See: *The Pornography Victims Protection Act of 1985,* Sen. Arlen Specter, S 1187, 131 Congressional Record, 99th Congress, pp S 6853-6855; see also, Senate Resolution 477, October 13, 1970, 116 Congressional Record 36459-60, whereby the United States Senate, in a 60-5 vote, rejected the majority report issued by the President's Commission on Obscenity and Pornography which found no relationship between obscenity and anti-social conduct.

termination be made of the character of expression prior to seizure. (*Marcus* v *Search Warrant, supra,* at p 732; Monaghan, *First Amendment "Due Process",* 83 Harv. L Rev 520, 522; cf, *Maryland* v *Macon,* ____US____, 53 USLW 4783, 4785.) The critical question is whether the affidavits were sufficiently detailed to permit the magistrate to focus searchingly on the question of obscenity. In my view, the procedure utilized by the magistrate and law enforcement personnel demonstrated the requisite sensitivity to freedom of expression, and was both reasonable under the circumstances and constitutional.

I am disturbed by the majority's departure from the traditional principles governing judicial review of a warrant issued upon probable cause. I had thought, as we have repeatedly held, that search warrant applications should be read in a common-sense and realistic manner and not in a hypertechnical manner. (*People* v *Hanlon,* 36 NY2d 549, 558-559.) A showing of probable cause requires much less evidence than does a finding of guilt. (*United States* v *Ventresca,* 380 US 102.) In dealing with probable cause, as the name itself implies, we deal with probabilities. (*New York* v *Quarles,* 467 US____, 104 S Ct 2626; *United States* v *Pryba,* 502 F2d 391, 404, cert den 419 US 1127.) Where the facts set forth in the police affidavit are sufficient in themselves to warrant a man of reasonable caution in the belief that the subject materials are obscene, probable cause exists and the magistrate may properly issue the warrant. (*Illinois* v *Gates,* 462 US 213, 51 USLW 4709; *Carroll* v *United States,* 267 US 132, 162.) Concomitant with the traditional deference paid to a magistrate's determination of probable cause by reviewing courts, we must recognize that our task is not to substitute our judgment as to probable cause but merely to determine whether there was a substantial basis for the magistrate's determination. (*Id;* see also, *United States* v *Fuller,* 441 F2d 755, 759.)

I take issue with the majority that the affidavits furnished the issuing magistrate did not describe the essential nature of the

movies as a whole. Each of the affidavits describing the films clearly state at the outset that "the *content* and character of the above mentioned video movie is as follows." Inasmuch as the magistrate was reviewing affidavits describing movies which were advertised by defendants as "adult cassette movies", it was reasonable for him to believe that the affidavits faithfully and accurately described the substance of each movie as a whole. Each affidavit describes the numerous acts of deviate sexual intercourse and the objectification of women occurring in each film which the majority concede to be offensive. Each film is of relatively short duration. Manifestly, the acts described in each movie consume a substantial time span. Thus, the magistrate may reasonably have concluded that the described, successive acts of deviate sexual intercourse pervaded each film. When the title of each movie is considered together with its plot and setting, its general theme and serious value, if any, may reasonably be discerned. The films were described in each of the five nonconclusory affidavits in such a fashion as to permit the magistrate to focus searchingly on the issue of obscenity. Under these circumstances, there was a reasonable basis for the magistrate to authorize the seizure of the films in question.

It is the majority's view that the affidavits provided the magistrate with insufficient information to determine probable cause for obscenity since the affidavits purportedly do not indicate whether the acts described "constitute all, most or a few of the scenes presented in the films" (slip op at 5). This statement is factually incorrect. First, as noted above, it is clear that each affidavit recited that it described the "*Content* and character" of each movie. This statement provided the magistrate with a reasonable basis to infer that the affidavits described most or all of the activities portrayed in each film. Second, the allegations in two of the affidavits state that the deviant sexual intercourse depicted in each film is pervasive. The affidavit describing "All American Girls" notes that "*[t]hroughout* the movie, the [six] girls remi-

nisce about their high school days with *each* one depicting her sexual *acts* with the male partner" [A-3][emphasis supplied]. Also, in the affidavit describing the film entitled "Debbie Does Dallas", it is stated that "*[t]hroughout,* the movie depicts some lesbianism along with sexual acts of intercourse, fellatio and cunnilingus" [A-5][emphasis supplied]. The use of the word "throughout" should certainly convey to any reasonable person that *all* or *most* of the movie has been described. It could not be more plainly said to permit a reasonable inference that the films predominantly depicted obscene sexual conduct. Any other reading of the affidavits is to substitute this Court's judgment for that of the magistrate and improperly engage this Court in a hypertechnical and semantical review of the affidavits.[5]

The decision of the United States Court of Appeals for the District of Columbia in *United States* v *Pryba* (502 F2d 391, cert den 419 US 1127), which the majority expressly declines to follow (slip op at 8, n. 4), is the leading federal case concerning the sufficiency of an affidavit submitted to demonstrate probable cause in obscenity cases. In *Pryba,* defendant was convicted of interstate transportation of obscene matter and possession of such matter with intent to disseminate. On appeal, defendant challenged the search of his premises on the basis that the affidavit underlying the warrant was insufficient to establish probable cause. The magistrate did not personally view the films alleged to be obscene. The description of the films to be seized was set forth in an affidavit which merely stated that: "The above films depict a man and female engaged in sexual intercourse, and various

[5] The majority asserts, without illustration, that the statements utilizing the word "throughout" are "patently ambiguous" and "may also be interpreted in other, less inculpatory ways" (slip op, at pp 6-7). The word "throughout" is defined by Webster's Third New International Dictionary as meaning "in or to every part: from one end to the other: everywhere". The use of the word "throughout" hardly creates or contributes to a patent ambiguity. Instead, it was indeed an attempt to describe the films as a whole, the continuity of the action or the pervasiveness of the sexual conduct.

other sexual activities by males and males and males and females." (582 F2d, at p 410, ¶ 5.) Applying the constitutional test of obscenity as set forth in *Miller* (502 F2d, at 404, n 90), and noting that the affidavit "described, though in good taste briefly, what the films depict" (502 F2d, at p 404) the D. C. Circuit held: "The question before the [warrant issuing magistrate] was whether, on the allegations of the affidavit, there was probable cause for believing that a violation of the obscenity laws had occurred. And '[i]n dealing with probable cause, * * * we deal with probabilities'; 'the term "probable cause" * * * means less than evidence which would justify condemnation'. The affidavit stated that the 'films depict' not only 'a man and a female engaged in sexual intercourse', but also 'various other sexual activities by males and males' as well as by 'males and females'. *We have no difficulty whatever in accepting that information as an adequate foundation for a belief by the [warrant issuing magistrate], if persuaded to so believe, that the films might well be judged obscene.*" (502 F2d, at p 404 [citations omitted] [emphasis supplied].) The D. C. Circuit clearly illustrates the proper role of a reviewing court in adjudging a magistrate's probable cause determination, and rejects the notion, adopted today by the majority in this court, that the supporting affidavit must unambiguously establish obscenity in order to demonstrate a probability that the film is obscene under the *Miller* test. (See also, *United States* v *Sherpix, Inc.*, 512 F2d 1361, 1368, 1369 [D.C. Cir.]; *United States* v *Middleton*, 599 F2d 1349, 1356, 1358 [5th Cir.]; *United States* v *Sherwin*, 572 F2d 196, 198, n.3 [9th Cir.], all of which expressly embrace the *Pryba* view.)

The recent case of *Sequoia Books, Inc.* v *McDonald* (725 F2d 1091 [7th Cir.], cert den ____US____, 53 USLW 3236) is instructive as to the issue at bar. In *Sequoia*, the Seventh Circuit addressed a claim brought by Sequoia seeking the return of seized magazines and an injunction against future seizures. Certain materials had been seized solely on the basis of a detailed affidavit

from a police investigator which described nine magazines. One magazine was thus described: "Magazine entitled 'Let's F_____' containing therein pictures describing vaginal intercourse, anal intercourse, cunnilingus and fallatio [sic]." Rejecting defendant's assertion that the affidavit failed to show probable cause that the seized material was obscene, Circuit Judge Posner, speaking for a unanimous court, stated: "There was, it is true, a possibility that photographs of sexual acts might be redeemed by aesthetic or other values, and hence that the officers might seize constitutionally protected materials. But the possibility was slight. * * * * The slight possibility of a temporary suppression of constitutionally protected sex magazines is not enough to invalidate the warrant under the Fourth Amendment." (725 F2d, at pp 1093-1094.) *Sequoia Books,* like *Pryba,* demonstrates the needlessness and irrelevance of the majority's requirement for mathematical specificity in warrant affidavits submitted at the probable cause stage of an obscenity prosecution. (See also, *United States* v *Christian,* 549 F2d 1369 [10th Cir.], cert den 432 US 910; *State* v *Tavone,* 482 A2d 693 [R.I.], cert den ____US____; *People* v *Hobbs,* 375 NE2d 1367 [Ill.].)

The federal authorities cited by the majority, which are affirmatively relied upon to demonstrate examples of affidavits containing sufficient information, simply do not support their holding. In *United States* v *Espinoza* (641 F2d 153, cert den 454 US 841 [slip op at p 7]), the warrant affidavit was deemed sufficient despite the fact that the eleven line summary of a 36-page magazine failed to indicate whether it encompassed the entire magazine or describe the text accompanying photographs. *United States* v *Sherpix, Inc.* (512 F2d 1361 [slip op at p 7]) merely reiterated the rule set forth by the United States Court of Appeals for the District of Columbia in *Pryba,* discussed above, and certainly did not *require* an unambiguous showing of obscenity. In *United States* v *Middleton* (599 F2d 1361 [slip op at p 7]), the affidavit does not purport to summarize *every* scene, as the majority

would here require, and the case relies heavily on *Pryba. United States* v *Marks* (520 F2d 913 [slip op at p 7]) is of virtually no precedential value since the extremely brief summaries were buttressed by a pre-seizure obscenity hearing — a procedure never required in New York (see *People* v *Heller,* 29 NY2d 319), and, indeed, the case was later reversed by the Supreme Court (430 US 188).

As a final point, I would note that the scope and execution of the warrant in this case were closely circumscribed to avoid impermissible interference with constitutionally protected expression. The Fourth Amendment requirement that warrants particularly describe the item to be seized must be observed with the most scrupulous exactitude when the material to be seized implicates First Amendment interests. (*Stanford* v *Texas,* 379 US 476, 485.) Strict adherence to the constitutional requirement of particularity eliminates any possibility that the officer in the field will exercise independent discretion and seize materials not judicially determined to be obscene. *Ad hoc,* non-judicial determinations of obscenity, made at the site of the seizure, are constitutionally proscribed. (See, e.g., *Marcus* v *Search Warrant,* 367 US 717, 731-732.) In this case, however, the particularity requirement was scrupulously honored. The warrant authorized detention of ten specifically named films which had been individually described in detail in police affidavits. Only those films were ordered detained. Thus, the warrant's scope was limited and reasonable.

A critical inquiry in a judicial determination as to the constitutional validity of a seizure of presumptively protected materials is the purpose for which the warrant was issued. Seizure may be effected to garner evidence for use in a subsequent criminal proceeding or, alternatively, to suppress and destroy the obscene materials. Where there is a seizure of large quantities of books for the sole purpose of their destruction, a prior judicial determination of obscenity in an adversary hearing is required to avoid

abridgement of the public's right to unobstructed circulation of nonobscene books. (*A Quantity of Books* v *Kansas,* 378 US 205, 213; see also, *Heller* v *New York,* 413 US 483, 491; *Marcus* v *Search Warrant,* 367 US 717.)

Here, however, the purpose of the search of the premises of Network Video and the detention of the ten films specifically named in the warrant application was solely to secure evidence to aid in the prosecution of defendants for promoting obscenity. There was no actual or constructive "seizure". As evidenced by the sworn, itemized inventory statement, only one or two copies of each of the films specified in the warrant application were taken during the execution of the warrant. The terms of the warrant commanded the police officers to enter Network Video and upon finding the *named* property, "it" was to be detained. In view of the detention of only one or two copies of each film named in the warrant, the executing officer understood the limitations and specificity of the warrant. (See *Stanford* v *Texas,* 379 US 476, 485: *Andresen* v *Maryland,* 427 US 463, 493 [Brennan, J., dissenting].) Moreover, there has been no showing that defendants were precluded, by injunction or otherwise, from offering for rental other copies of the movies or restocking their supply of said movies. As in *Heller* v *New York* (413 US 483, 490, *supra*), the films were not subject to any form of "final restraint". There was no injunction against exhibition or threat of destruction. Rather, one or two copies of each film were merely detained for preservation as evidence (*Perial Amusement Corp.* v *Morse,* 482 F2d 515, 525 [2d Cir]).[6] The limited nature of the detention represents a *bona fide* attempt to strike a proper balance between the need to preserve evidence for use in criminal

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[6] The Supreme Court has noted the special problems associated with the preservation of movies as evidence: "We again take judicial notice that films may be compact, may be easy to destroy or to remove to another jurisdiction, and may be subject to pretrial alterations by cutting out scenes and resplicing reels." (*Roaden* v *Kentucky,* 413 US 496, 505, n.6; *Heller* v *New York,* 413 US 485, 493.)

prosecutions and the right of the public of unobstructed access to nonobscene materials. (See *Sequoia Books Inc.* v *McDonald,* 725 F2d 1091, 1093-1094, cert den ____US____, 53 USLW 3236.)

Accordingly, it is my view that the order of County Court should be reversed, the motion to suppress denied, and the case remitted to the Depew Village Court for further proceedings.

* * * * * * * * * * *

Order affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer, Kaye and Alexander concur. Judge Jasen dissents and votes to reverse in an opinion. Judge Titone took no part.

Decided July 5, 1985

"TABOO II"

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 23rd, 1983, I viewed the video tape movie "TABOO II", which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 9:00 A.M. and with several interruptions lasted until 12:12 P.M.

The content and character of the above mentioned video movie: The theme of the movie is a middle-class neighborhood where a home is the place where all the sexual acts are performed. The movie starts with a brother and sister, a white male and white female, fondling each other. The second scene is another house scene where a white male and white female are giving a rubdown to a white female. The sexual acts that follow include cunnilingus and fellatio. There is also intercourse and the scene closes with the male placing his penis between the girl's breasts and ejaculating into and over her mouth. In another scene there is some incestuous type activity between the brother and the sister where again fellatio and intercourse are performed. At one point during the movie the mother enters the bedroom and observes the two performing the sexual acts and becomes depressed about the situation. In a later scene the son and his mother are on a couch where they become involved in sexual acts of intercourse and fellatio. The movie closes with the mother and father asleep in their bedroom at which time the daughter enters and sleeps next to her father, where they perform incestuous acts of intercourse, and she performs fellatio on her father.

"CALIFORNIA VALLEY GIRLS"

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 26, 1983, I viewed the video tape movie "CALIFORNIA VALLEY GIRLS", which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 12:00 Noon and lasted until 1:33 P.M.

The content and character of the above mentioned video movie is as follows: Six white females, approximately 18 to 25 years of age, are unemployed and attempt to make a living by becoming prostitutes. The first scene is a bedroom scene where two females are involved in love making, fondling and cunnilingus. The second scene depicts a white male and a white female having intercourse in the back of a van. The third scene is a house scene where six girls, all white females are introduced to the art of love making. One male, approximately 35 years of age, is teaching the girls the art of fellatio with each one of them performing this act on him. The next scene is a bedroom scene in a home where a husband and wife, a white male and a white female, alone with a girl, a white female, perform various sexual acts which include intercourse, fellatio, anal intercourse and cunnilingus. The movie ends with some lesbianism where the wife performs cunnilingus on the girl while she performs fellatio on the husband and they engage in intercourse and anal intercourse.

"ALL AMERICAN GIRLS"

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 28th, 1983, Detective Sergeant Vincent Costanza, a Member of the Erie County Sheriff's Department and I viewed the video tape movie "ALL AMERICAN GIRLS", which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 11:35 A.M., and lasted until 1:00 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a home of one of six girls, all white females who had previously attended high school and were meeting for a reunion. The first scene is two girls in a room performing acts of lesbianism, namely cunnilingus on each other. They are met by a white male and they perform acts of fellatio on him, have intercourse and all leave the room. Throughout the movie the girls reminisce about their high school days with each one depicting her sexual acts with her male partner. The sexual acts which followed included intercourse, fellatio and cunnilingus.

"TABOO"

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 29th, 1983, I viewed the video tape movie "TABOO", which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 11:00 A.M. and lasted until 11:55 A.M. and watched again commencing at 1:42 P.M. and lasting until 2:23 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a bedroom scene where two white females and one white male perform various acts of fellatio, cunnilingus and intercourse. The second scene is a house party scene where many white males and white females are involved in various acts of intercourse, fellatio and cunnilingus. There is also a scene where females perform acts of cunnilingus on each other. The movie portrays at one point a bedroom scene with a white male, the son, laying in bed naked, at which time his mother, a white female enters the room. She makes love to him and incestuous acts of intercourse, placing of the penis between her breasts, ejaculation and cunnilingus are performed.

"DEBBIE DOES DALLAS"

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 3rd, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "DEBBIE DOES DALLAS", which was rented on September 30th, 1983, by Vincent Costanza from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 2:50 P.M. and lasted until 4:23 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a girl moving out west for a change of atmosphere. The first scene is a jail scene where a white female is in jail after she had been put there by the so-called Sheriff, a white male, and she performs fellatio on him. The two then perform intercourse, at which time he removes his pants and ejaculates over her buttocks. The second scene is the ranch, a so-called house of ill repute, a bedroom scene in which a white male and a white female are involved in various sexual acts including fellatio, cunnilingus and intercourse. At the end of the scene the male ejaculates in and over the female's mouth. The third scene, a bathroom scene, depicts some lesbianism involving three girls. They participate in love making, foreplay and performing cunnilingus on each other. Throughout, the movie depicts some lesbianism along with sexual acts of intercourse, fellatio and cunnilingus.

APPENDIX C —
MEMORANDUM DECISION OF
ERIE COUNTY COURT
DATED SEPTEMBER 20, 1984

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
Appellant

vs.

P.J. VIDEO INC., d/b/a
NETWORK VIDEO and
JAMES ERHARDT
Defendants-Respondents

RICHARD J. ARCARA, ESQ.
District Attorney of Erie County
By: JO W. FABER, ESQ.
Assistant District Attorney
Appearing for the People.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
By: MARY GOOD, ESQ., Of Counsel
One Niagara Square
Buffalo, New York 14202
Attorney for the Defendant.

MEMORANDUM

LaMENDOLA, J.

This is an appeal from an order of the Village of Depew Justice Court, (Hon. Wick, J.) dated March 23, 1984 suppressing all evidence obtained pursuant to a search warrant issued on November 21, 1983, by the Honorable Theodore S. Kasler, Justice of the Supreme Court. After the execution of the warrant, the defendants P.J. Video, Inc., and James Erhardt are charged with multiple

counts of the crime of Obscenity in the Third Degree (Penal Law §235.05-1) Misdemeanors.

A hearing was held on February 15, 1984 on the issues raised by the defendants in their Omnibus Motion.

On November 21, 1983, Honorable Theodore S. Kasler, Justice of the Supreme Court, authorized the warrant for the seizure from the defendants of ten video cassette movies.

Upon execution police officers confiscated one copy each of the movies entitled Body Magic, Every Which Way She Can, and the Filthy Rich and two copies of the movies Taboo II and Taboo, All American Girls, Deep Throat and Little Girls Blue.

The Court below in a written decision dated February 23, 1984 suppressed all evidence obtained as a result of said warrant based upon its finding that the issuing magistrate failed to make an independent probable cause determination sufficient to justify the search.

The Appellant contends that the determination of probable cause was judicially made and predicated upon specific and adequate factual information. In addition the Appellant contends that the Court below improperly suppressed the evidence obtained by a search warrant issued by a Superior Court Justice. The record fails to disclose a transcript, if any, of an *in-camera* proceeding at the time of the issuance of the search warrant in question.

The issue of the authority of a lower court to review or reverse the search warrant issued by a Superior Court Justice was not raised in the hearing before the Court below.

Under the circumstances and facts of this case, this Court finds the practice of obtaining search warrants issued by Supreme Court Justices to be cumbersome and procedurally awkward under Section 10.30 subd. 3 of the Criminal Procedure Law concerning jurisdiction of misdemeanors.

(§10.30(3) of the Criminal Procedure Law)
"Notwithstanding the provisions of subdivision one, a superior court judge sitting as a local criminal court does not have trial jurisdiction of any offense, but has preliminary jurisdiction only, as provided in subdivision two."

This Court, however, disagrees with the contention of the Respondent that the Supreme Court Justice did not have jurisdiction in this case to hear a suppression motion on the warrant.

In the absence of a constitutional amendment, the Court finds that an interpretation of Section 10.30(3) of the Criminal Procedure Law withholding jurisdiction of a Supreme Court Justice in such criminal offenses, to be unconstitutional (*People v. Darling*, 50 AD2d 1038).

Moreover, Section 10.30(3) of the Criminal Procedure Law specifically refers to a Superior Court Judge "sitting as a local criminal court" (emphasis added) and in the opinion of this Court, for this reason does not conflict with the New York State Constitution Article 6, paragraph 7(a) giving Supreme Court general original jurisdiction in law and equity.

Section 10.30(3) of the Criminal Procedure Law, as stated, this Court finds that Section 10.30(3) of the Criminal Procedure Law is not incompatible with the Constitution.

In the instant case the Justice signing the search warrant at the time was "a Supreme Court Justice." According to the record of the case, he was not at the time "sitting as a local criminal court" and he did not sign the search warrant while sitting as a local criminal court judge but, in fact, signed as a Justice of the Supreme Court.

Notwithstanding the provisions of Section 10.30(3) of the Criminal Procedure Law, this Court finds that Justice Kasler, who acted in his capacity as a Supreme Court Justice, had the authority to sign the subject search warrant and to hear the suppression motion.

In this case, however, on the issue of sufficiency in the absence of a transcript of any *in-camera* proceedings, it is impossible to determine if, in fact, the issuing justice conducted a full and searching inquiry into the facts on which the warrant application was based.

Under the circumstances of this case, the Court finds the holding of the Court below that under New York law, the issuing magistrate had failed to make an adequate finding of probable cause for the issuance of the warrant because he relied solely upon the affidavits of the police officers without any further investigation or viewing of the materials to be confiscated, was not an improvident abuse of discretion.

Moreover, since the Appellant never raised the issue of the lack of authority of the Court below to review or reverse a warrant issued by a Superior Court, this Court is precluded from addressing the issue since the issue was not preserved for review.

Judgment of the Court below is affirmed.

ROSE D. LaMENDOLA
J.C.C.

DATED: Buffalo, New York
September 20, 1984.

APPENDIX D — ORDER OF ERIE COUNTY COURT DATED OCTOBER 3, 1984

At a Special Term of the County Court, held in and for the County of Erie, at Buffalo, New York, on the day of October, 1984.

PRESENT: HON. ROSE D. LaMENDOLA
Justice Presiding

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs. ORDER

P.J. VIDEO INC., d/b/a
NETWORK VIDEO and
JAMES ERHARDT,
Defendants-Respondents.

The above named appellant, THE PEOPLE OF THE STATE OF NEW YORK, having appealed to this Court from an Order of the Village of Depew Justice Court (Wick, J.), dated March 23, 1984, and said appeal having been argued by LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, MARY GOOD, ESQ., of counsel for defendants-respondents, and RICHARD J. ARCARA, District Attorney of Erie County, JO W. FABER, ESQ., of counsel for appellant, and due deliberation having been had thereon, it is hereby

ORDERED that the Order so appealed from be and the same hereby is affirmed.

[Signature]
ROSE D. LaMENDOLA, J.C.C.

ENTER [GRANTED October 3rd 1984/Signature/Court Clerk]

APPENDIX E — MEMORANDUM DECISION OF VILLAGE OF DEPEW VILLAGE COURT DATED FEBRUARY 23, 1984

STATE OF NEW YORK : COUNTY OF ERIE
VILLAGE COURT : VILLAGE OF DEPEW

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

vs.

JAMES ERHARDT,
Defendant.

DECISION

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

vs.

P. J. VIDEO, INC.,
d/b/a NETWORK VIDEO,
Defendant.

The defendants James Erhardt and P. J. Video, Inc. are charged with four counts of obscenity in violation of Section 235.04 (I) of the Penal Law. The defendants were arraigned on January 14, 1984, entered pleas of not guilty and the matter was adjourned to February 15, 1984, for presentation of pre-trial motions. Numerous motions were presented, but for purposes of expediency, it was deemed that all were denied except for the motion to suppress and arguments were heard regarding the legal sufficiency of the warrant issued by Justice Kasler on November 21st, 1983.

Obscenity in the second degree (Subdivision 1) is defined as follows:

> "A person is guilty of obscenity in the second degree when, knowing its content and character, he:
>
> 1. Promotes, or possesses with intent to promote any obscene material;"

Section 235.00 of the Penal Law defines "Obscene" as follows:

> "Any material or performance is obscene if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the purient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality,
>
> masturbation, sadism, masochism excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

The warrant as issued by Justice Kasler with great specificity states that it was issued with reliance upon affidavits filed with the Court by Investigator David J. Groblewski and Sgt. Vincent Costanza; there is no indication whatsoever that Justice Kasler made any further viewing of the allegedly obscene material beyond a review of the submitted affidavits. Based on these affidavits, the following video cassette movies were declared to be obscene: California Valley Girls, Tabboo II, Tabboo, All American Girls, Debbie Does Dallas, Body Magic, Every Which Way She Can, Deep Throat, Little Girls Blue and Filthy Rich. A search for these items was ordered. There was no mention of "Falcon" and "Pac 30."

Sergeant Vincent Costanza's sole contribution in his affidavit was a recital that he purchased various video cassettes on various dates, and that he has obtained a list of movies available for rental. Cassettes of "Falcon" and "Pac 30" are not included in the statement that he had purchased them.

David J. Groblewski, submitted ten affidavits. A review of these documents shows him to be a retired State Trooper who diligently and assiduously reviewed the various cassettes for evidence of intercourse and other assorted sexual activities which he scrupulously recited. He obviously paid no attention to contemporary community standards, made no determination if the depicted acts were offensive and made no further determination if the presentations had any literary, artistic, political or scientific value.

The Supreme Court has made various decisions on the subject at hand. See (*Lee Art Theatre, Inc.* vs. *Virginia* 392 U.S. 636). We need to confine ourselves only to New York State decisions. In *People* vs. *Rothenberg* (20 NY 2d35), a warrant was given authorizing a search for lewd motion picture films, upon the affidavit of a police officer. In ordering a new trial for failure to suppress the articles seized the Court said:

> ....the confines of what is permitted as free speech under the First Amendment .... cannot be left to the determination of police chiefs and patrolmen everywhere ....if that were done there would be as many different standards of what constitutes obscenity as there are policemen ..... the power and duty of making that determination is conferred upon the courts .....

In *People vs. Potwora* (48 NY 2d91) an application for a search warrant to discover allegedly obscene materials, was supported by an affidavit of police officers that Rochester City Court and Buffalo City Court judges had found certain material to be obscene. The decision to suppress the materials seized was affirmed and the court said:

> .....the fundamental requirement that a neutral and detached Magistrate make an independent determination of probable cause is not fulfilled unless the issuing Magistrate himself conducts a full and searching inquiry into the facts on which the warrant application is based. The obligation is one which may not be delegated, in part or in whole, regardless of the qualifications of the person on whom reliance is placed. Thus it would be improper to share the required determination even with another judge of the same jurisdiction who, if application was properly made, would be

> equally empowered to issue the warrant sought.....We conclude that because ....the justice failed to personally conduct the searching inquiry necessary to a proper determination of probable cause the warrant issued was invalid (and) all the materials seized were properly suppressed
> . . . . .

In *People vs. Morris Abromovitz* (31 NY 2d 160) the court said:

> .....it has undoubtedly become a settled principle that a judge must decide preliminarily whether the particular material on which he is asked to authorize seizure is obscene and that this must not be left open to the judgment of the police.

In this instance, it was an investigator assigned to the District Attorney's office who made the allegation that the materials seized were obscene; there exists a possibility that there might be the perception of a persecution rather than a prosecution and the Courts must be especially vigilant that the District Attorney, an elected official who is sworn to "protect the innocent and prosecute the guilty," is not perceived to have the proper detachment from the criminal matter that he or his staff may be prosecuting.

In making its decision, this Court makes no judgment on the content of the items seized. The material contained therein may be of the type proscribed by Section 235.05 of the Penal Law but equally, it may be ....."coarse, puerile, offensive and distasteful (and still not) obscene under the law or proscribable." (See *People vs. Stabile* 296 N.Y.S. 2d 815). "The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." (*U.S. vs. Ballard* 322 U.S. 78, at pg. 95.)

The motion made to suppress any and all evidence obtained as a result of the execution of Justice Kasler's warrant is herewith granted. The Informations charging Defendants with the sale of the video cassettes "Falcon" and "Pac 30" are herewith dismissed on the Court's own motion. There being no opposition to the District Attorney's cross motion, it is also granted. Leave is given to file additional motions, if it should prove necessary.

[Signature]
Justice — Village of Depew

DATED: February 23, 1984.

APPENDIX F —
ORDER OF
VILLAGE OF DEPEW VILLAGE COURT
DATED MARCH 23, 1984

At a Trial Term of the Village Court, Village of Depew, held in and for the County of Erie, on the day of March, 1984.

PRESENT: HON. HENRY S. WICK
Justice — Village of Depew

STATE OF NEW YORK : COUNTY OF ERIE
VILLAGE COURT : VILLAGE OF DEPEW

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

vs.

JAMES ERHARDT,
Defendant.

ORDER

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

vs.

P.J. VIDEO, INC.
d/b/a NETWORK VIDEO,
Defendant.

The defendants having moved this Court for an Order suppressing evidence, and of any information obtained therefrom and suppressing the use of said evidence upon the trial of the above named defendants,

NOW, on reading and filing the notice of motion dated January 31, 1984 and the affidavit of PAUL J. CAMBRIA, JR., ESQ., sworn to on the 30th day of January, 1984, with proof of service thereof on behalf of each defendant, in support of the motion, and the affidavit of Assistant District

Attorney THOMAS F. FRANCZYK, sworn to the 10th day of February, 1984, in opposition thereto, and having heard Stanley J. Sliwa, Esq., in support of said motion and Assistant District Attorney Franczyk in opposition thereto at argument before this Court held on February 15, 1984, and on all the evidence adduced before the Court and due consideration having been had, and the Court rendered its decision in writing, dated February 23, 1984, it is hereby

ORDERED, that the said motion be granted in all respects, and it is further

ORDERED, that the District Attorney of Erie County be and is restrained and precluded from using, upon the trial of the above named defendants, any of the said evidence, to wit, the following video cassette movies:

California Valley Girls;
Taboo II;
Taboo;
All American Girls;
Debbie Does Dallas;
~~Body Magic;~~
~~Deep Throat;~~
~~Every Which Way She Can;~~
~~Filthy Rich;~~
~~Little Girls Blue;~~

and any fruits derived therefrom, either directly or indirectly, and it is further

ORDERED, that the Informations charging the defendants with the sale of the video cassette movies, "Falcon" and "Pac 30" are herewith dismissed on the Court's own motion, and it is further

ORDERED, that all video cassette movies enumerated above and any copies made therefrom be restored to defendants forthwith.

[Signature]
Justice — Village of Depew

ENTER:
[Dated 23rd day/of March 1984/Depew, N.Y.]

APPENDIX G — APPLICATION FOR SEARCH WARRANT DATED NOVEMBER 21, 1983

FOR USE WHEN NO IN-CAMERA HEARING IS HELD

SUPREME COURT
COUNTY OF ERIE, NEW YORK

IN THE MATTER OF

The application of DET. VANCE SCIOLI for a Warrant authorizing the search of NETWORK VIDEO, 5868 Transit Road, Depew, New York occupied by NETWORK VIDEO for certain property, to wit: Video cassettes believed to be obscene, to wit: video cassettes entitled:

"California Valley Girls", "Taboo II", "All American Girls", "Debbie Does Dallas", "Body Magic", "Deep Throat", "Every Which Way She Can", "Filthy Rich", "Little Girls Blue" [and "Taboo"] which property constitutes evidence or tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense.

STATE OF NEW YORK)
COUNTY OF ERIE)SS:

VANCE SCIOLI, being duly sworn, deposes and says:

1. I am a detective employed by the Village of Depew Police Department.

2. I have information based upon the attached affidavits of Det. Sgt. Vincent F. Costanza of the Erie County Sheriff's Department and Inv. David J. Groblewski of the Erie County District Attorney's Office.

I have made the following personal observations:

NETWORK VIDEO is a store located at *5868 Transit Road,* in the Village of Depew, and such store purports to sell, rent and service video equipment and cassettes.

3. It is further requested that the issuing Judge allow the seizure of "any personal papers or documents which would tend to identify the owner, leasee or whomever has custody or control over the premises searched or the items seized".

Based upon the foregoing reliable information from attached affidavits, there is probable cause to believe that the following, to wit: video cassettes believed to be obscene and titled as follows:

"California Valley Girls", "Taboo !I", "All American Girls", "Debbie Does Dallas", "Body Magic", "Deep Throat", "Every Which Way She Can", "Filthy Rich", "Little Girls Blue" [and "Taboo"] may be found at the above-mentioned premises, and said property constitutes evidence or tends to demonstrate that an offense or crime was committed or that a particular person participated in the commission of an offense or crime.

To wit: violations of §235.05 [sub 1] of the New York State Penal Law — Promoting Obscenity in the Third Degree.

WHEREFORE, I respectfully request that the Court issue a Warrant and Order of Seizure in the form annexed authorizing the search of the premises located at 5868 Transit Road, Depew, NY and occupied by "NETWORK VIDEO", and directing that if such property or evidence or any part thereof be found that it be seized and brought before the Court, together with such other and further relief as the Court may deem proper.

No previous application in this matter has been made in this or any other Court or to any other Judge, Justice or Magistrate.

[Signature]
VANCE SCIOLI

Sworn to before me this
[21st] day of November, 1983.

[Signature]
J.S.C.
[3:57 P.M.]

Reviewed by:
Assistant District Attorney

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

VINCENT COSTANZA, being duly sworn, deposes and says:

I am presently employed as a Detective Sergeant with the Erie County Sheriff's Department assigned to the Detective Division.

On the following dates I rented the following sound video cassette movies from NETWORK VIDEO, 5868 Transit Road, Depew, New York:

1. "CALIFORNIA VALLEY GIRLS", rented 9/20/83
2. "TABOO II", rented 9/20/83
3. "TABOO", rented 9/27/83
4. "ALL AMERICAN GIRLS", rented 9/27/83
5. "DEBBIE DOES DALLAS", rented 9/30/83

Each of these cassette movies was marked in an inconspicuous manner and turned over personally to Investigator David J. Groblewski of the Erie County District Attorney's Office by your deponent for viewing and copying. The content of the aforesaid video cassette movies is individually detailed in the annexed affidavits of Investigator Groblewski.

On November 17, 1983, your deponent rented "CALIFORNIA VALLEY GIRLS" from the owner of Network Video, one James Erhardt. The content of this video cassette movie

is also detailed in the annexed affidavit of Investigator Groblewski. On November 17th, 1983, your deponent obtained a list of adult cassette movies available for rental from Network Video from James Erhardt, said list been annexed as an exhibit hereto. Included on said list are the following titles:

1. "DEEP THROAT"

2. "LITTLE GIRLS BLUE"

3. "BODY MAGIC"

4. "EVERY WHICH WAY SHE CAN"

5. "THE FILTHY RICH"

Your deponent is familiar with the aforesaid video cassette movies and upon information and belief, said video cassette movies have been previously reviewed by Investigator David Groblewski. Affidavits detailing the content of each of the aforesaid video cassette movies are annexed as exhibits hereto.

[Signature]
Det. Sgt. Vincent Costanza

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

[Network Video/Adult Cassette Movie List/Location: 5868 Transit Rd./Depew N.Y. 14043/(716) 683-5878]

1-All American Girls
2-Bad Girls
3-Body Magic
4-California Valley Girls
5-Debbie Does Dallas
6-Deep Throat
7-Doing It
8-Every Which Way
9-Filthy Rich
10-Foxtrot
11-Girl From S.E.X.
12-I Like to Watch
13-Insatiable
14-Irresistable
15-Little Girl Blue
16-Memphis Cathouse
17-Nothing To Hide
18-Peepholes
19-Skin Tight
20-Society Affair
21-Summer of '72
22-Taboo
23-Taboo II
24-Talk Dirty II
25-Up and Coming
26-Peaches & Cream
27-In Love
28-Naughty Girls Need Love
29-Babylon Pink
30-Scoundrels

[11-17-83/V.C.]

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 9th, 1983 I viewed the video tape movie "DEEP THROAT", which was rented on September 7th, 1983 from the Video Connection, Route 5, Derby, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 9:58 A.M. and lasted until 10:59 A.M.

The content and character of the above mentioned video movie is as follows: The first scene, a white female named Linda walks into her home, into the kitchen, and observes a white male performing cunnilingus on a white female that is sitting on the table. The second scene is a bedroom scene, Linda and her girlfriend are about to perform various sexual acts with eleven or twelve white males there present. These subjects then began a systematic routine of sexual acts which included intercourse, cunnilingus, fellatio, and anal sex. The scene ended with Linda having intercourse with a white male. The fourth scene shows Linda entering a psychiatrist's office to ascertain why she cannot reach a climax. Upon examination he determines she has a clitoris in her throat. After the exam, Linda performs fellatio on the doctor and the scene ends with her getting a job as a nurse.

The scenes shift back and forth in the doctor's office and in one of the scenes Linda is on the table having intercourse with a white male. While having intercourse, he places into her vagina a

test tube and fills it with wine which he sucks up with a plastic hose. The other sexual act is performed with the nurse and the doctor having intercourse and the doctor receiving fellatio from the nurse.

The sixth scene goes back to Linda's home where she is awakened by an apparent burglar entering the house. The thief gets aroused by Linda and engages in foreplay, at which time Linda performs fellatio on the thief. The movie comes to an end with the burglar ejaculating over Linda.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to before
me this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office, and prior to this, a member of the New York State Police for approximately 25 years.

On September 23rd, 1983, I viewed the video tape movie "TABOO II", which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 9:00 A.M. and with several interruptions lasted until 12:12 P.M.

The content and character of the above mentioned video movie: The theme of the movie is a middle-class neighborhood where a home is the place where all the sexual acts are performed. The movie starts with a brother and sister, a white male and white female, fondling each other. The second scene is another house scene where a white male and white female are giving a rubdown to a white female. The sexual acts that follow include cunnilingus and fellatio. There is also intercourse and the scene closes with the male placing his penis between the girl's breasts and ejaculating into and over her mouth. In another scene there is some incestuous type activity between the brother and the sister where again fellatio and intercourse are performed. At one point during the movie the mother enters the bedroom and observes the two performing the sexual acts and becomes depressed about the situation. In a later scene the son and his mother are on a couch where they become involved in sexual acts of intercourse and fellatio.

The movie closes with the mother and father asleep in their bedroom at which time the daughter enters and sleeps next to her father, where they perform incestuous acts of intercourse, and she performs fellatio on her father.

[Signature]

Subscribed and sworn to before me
this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 26th, 1983, I viewed the video tape movie "CALIFORNIA VALLEY GIRLS", which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 12:00 Noon and lasted until 1:33 P.M.

The content and character of the above mentioned video movie is as follows: Six white females, approximately 18 to 25 years of age, are unemployed and attempt to make a living by becoming prostitutes. The first scene is a bedroom scene where two females are involved in love making, fondling and cunnilingus. The second scene depicts a white male and a white female having intercourse in the back of a van. The third scene is a house scene where six girls, all white females are introduced to the art of love making. One male, approximately 35 years of age, is teaching the girls the art of fellatio with each one of them performing this act on him. The next scene is a bedroom scene in a home where a husband and wife, a white male and a white female, alone with a girl, a white female, perform various sexual acts which include intercourse, fellatio, anal intercourse and cunnilingus. The

movie ends with some lesbianism where the wife performs cunnilingus on the girl while she performs fellatio on the husband and they engage in intercourse and anal intercourse.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 28th, 1983, Detective Sergeant Vincent Costanza, a Member of the Erie County Sheriff's Department and I viewed the video tape movie "ALL AMERICAN GIRLS", which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 11:35 A.M., and lasted until 1:00 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a home of one of six girls, all white females who had previously attended high school and were meeting for a reunion. The first scene is two girls in a room performing acts of lesbianism, namely cunnilingus on each other. They are met by a white male and they perform acts of fellatio on him, have intercourse and all leave the room. Throughout the movie the girls reminisce about their high school days with each one depicting her sexual acts with her male partner.

The sexual acts which followed included intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 29th, 1983, I viewed the video tape movie "TA-BOO", which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 11:00 A.M. and lasted until 11:55 A.M. and watched again commencing at 1:42 P.M. and lasting until 2:23 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a bedroom scene where two white females and one white male perform various acts of fellatio, cunnilingus and intercourse. The second scene is a house party scene where many white males and white females are involved in various acts of intercourse, fellatio and cunnilingus. There is also a scene where females perform acts of cunnilingus on each other. The movie portrays at one point a bedroom scene with a white male, the son, laying in bed naked, at which time his

mother, a white female enters the room. She makes love to him and incestuous acts of intercourse, placing of the penis between her breasts, ejaculation and cunnilingus are performed.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 30th, 1983, I viewed the video tape movie "LITTLE GIRLS BLUE", which was rented on September 29th, 1983 from Video Vision, 1340 North Forest Road, Amherst, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 1:45 P.M. and lasted until 3:20 P.M.

The content and character of the above mentioned video movie is as foliows: The theme of the movie is a high school for girls only. The first scene displays a picture of a penis with a young white girl observing it. She then performs fellatio on it and after a short while it ejaculates in her mouth. The second scene depicts a white female student fantasizing about having sex with her teacher. The sexual acts which followed included intercourse, fellatio and cunnilingus. The third scene is a schoolyard where the gym teacher again fantasizes about having sex with one of the girls playing with a ball. They eventually have intercourse and she performs fellatio on him. He then ejaculates in her mouth. The fourth scene has one boy, a white male, and one girl, white female, in a parked car in a lovers lane. The sexual acts of, again, intercourse, fellatio and cunnilingus are performed. The fifth scene depicts two white males and one white female in a bar where one of the white males is having anal intercourse with the

female while she is performing fellatio on the other white male. The sixth scene is the girls' dormitory where the gym teacher enters the room and makes love to one of the young white females. Here they perform intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to before
me this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 3rd, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "BODY MAGIC", which was rented on September 29th, 1983 from Network Video, 3187 Eggert Road, Colvin Eggert Plaza, Tonawanda, New York. This movie was viewed in my office starting at 10:58 A.M. and lasted until 12:32 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a photographic studio in which the photographer, a white male, is snapping pictures of a model, a white female, after which they become involved in love making, fellatio and intercourse. The second scene, in another part of the studio, depicts one white male and two white females performing various sexual acts including fellatio and cunnilingus. There is also one part of this scene where there is some lesbianism where the one female performs cunnilingus on the other.

Throughout this movie the cast of characters perform various sexual acts of intercourse, cunnilingus, fellatio and some lesbianism.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 3rd, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "DEBBIE DOES DALLAS", which was rented on September 30th, 1983, by Vincent Costanza from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 2:50 P.M. and lasted until 4:23 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a girl moving out west for a change of atmosphere. The first scene is a jail scene where a white female is in jail after she had been put there by the so-called Sheriff, a white male, and she performs fellatio on him. The two then perform intercourse, at which time he removes his pants and ejaculates over her buttocks. The second scene is the ranch, a so-called house of ill repute, a bedroom scene in which a white male and a white female are involved in various sexual acts including fellatio, cunnilingus and intercourse. At the end of the scene the male ejaculates in and over the female's mouth. The third scene, a bathroom scene, depicts some lesbianism involving three girls. They participate in love making, foreplay and per-

forming cunnilingus on each other. Throughout, the movie depicts lesbianism along with sexual acts of intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to before
me this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 4th, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "THE FILTHY RICH", which was rented on October 3rd, 1983 by Vincent Costanza from the Network Video, 3187 Eggert Road, Colvin-Eggert Plaza, Tonawanda, New York. This movie was viewed in my office starting at 11:40 .M. and lasted until 12:58 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a bedroom scene with a white male and white female, with the white female performing fellatio on the male. The act concludes with the two having intercourse. The second bedroom scene is a white male performing cunnilingus on a white female, and then the two have intercourse and prior to reaching a climax he withdraws his penis and ejaculates over her body. The scene shifts to a kitchen, bedroom and a sauna bath where white females and white males perform a systematic routine of fellatio, cunnilingus and intercourse. The scene in the basement depicts a white female tied and a white

male enters the room and performs cunnilingus on her. Other white males enter and they all are involved in acts of intercourse, anal intercourse and masturbation.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 6th, 1983, I viewed the video tape movie "EVERY WHICH WAY SHE CAN", which was rented on October 5th, 1983 from Network Video, 3187 Eggert Road, Colvin-Eggert Plaza, Tonawanda, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 8:12 A.M. and lasted until 9:31 A.M.

The content and character of the above mentioned video movie is as follows: The above mentioned movie's background is a bar where two white females are involved in a wrestling match. These subjects then become involved in a lesbianism act, performing cunnilingus on each other. The second scene is a bathroom scene where a white female is performing fellatio on a white male. They then have intercourse and he masturbates and ejaculates over her face. The third scene is a car scene where there is a fight where three white males, motorcyclists, attack a couple in a car. The three then make the girl perform acts of fellatio on two of the bikers and a third makes her have intercourse with him.

The scene shifts back and forth from the bar to a table, and so forth, where a systematic routine of sexual acts including intercourse, fellatio and cunnilingus are performed.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

APPENDIX H —
SEARCH WARRANT
DATED NOVEMBER 21, 1983

(FOR USE WHEN NO IN-CAMERA HEARING HELD)

SEARCH WARRANT

Pursuant to Section 690.05 Et Seq.
of the Criminal Procedure Law

SUPREME COURT
COUNTY OF ERIE, NEW YORK

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

TO: *DET. VANCE SCIOLI*

Proof, by affidavit, having been this day made before me, by Confidential Criminal Investigator, David J. Groblewski, Erie County District Attorney's Office and Sgt. Vincent Costanza, Erie County Sheriff's Department that there is probable cause to believe that certain property constitutes evidence or tends to demonstrate that an offense or crime was committed, to wit: The following sound video cassette movies rented and purchased from NETWORK VIDEO:

1. "California Valley Girls", rented 9/20/83 at 2:30 P.M.;
2. "Taboo II", rented 9/20/83;
3. "Taboo", rented 9/27/83 at 12:10 P.M.;
4. "All American Girls", rented 9/27/83;
5. "Debbie Does Dallas", rented 9/30/83 at 2:00 P.M.

All of the aforesaid movies were copied, identified and marked prior to their return to NETWORK VIDEO.

A list of video cassette movies available for rental at NETWORK VIDEO was procurred by Sgt. Costana on 11/17/83. All

of the aforesaid films were included on said list. Additionally, the following video cassette movies were included on that list as available for rental on 11/17/83:

1. "Body Magic";
2. "Every Which Way She Can";
3. "Deep Throat";
4. "Little Girls Blue";
5. "Filthy Rich".

The aforesaid list containing all the above-mentioned cassette movies is annexed hereto.

All of the aforesaid video cassette movies were turned over to Investigator David Groblewski of the Erie County District Attorney's Office for copying and review. The contents of each is detailed in the affidavits of Investigator Groblewski annexed hereto.

All of the aforementioned video cassette movies are believed to be obscene in violation of §235.05 [sub 1] of the New York State Penal Law.

YOU ARE THEREFORE, COMMANDED, within 10 days of the date of issuance of this Warrant in the daytime to make an immediate search of premises located at NETWORK VIDEO, 5868 Transit Road, Depew, New York occupied by NETWORK VIDEO for the following property, to wit: The following sound video cassette movies entitled:

1. "California Valley Girls"
2. "Taboo II"
3. "Taboo"
4. "All American Girls"
5. "Debbie Does Dallas"

6. "Body Magic"
7. "Deep Throat"
8. "Every Which Way She Can"
9. "Filthy Rich"
10. "Little Girls Blue"

and for any personal papers or documents which tend to identify the owner, leasee or whomever has custody or control over the premises or vehicle searched or the items seized, and seize said property forthwith.

YOU ARE, THEREFORE, FURTHER COMMANDED to enter said premises, and if you find the same or any part thereof, to bring it forthwith before me at the Erie County Supreme Court, in the County of Erie, New York.

Dated at the said County of Erie,
New York on the [21] day of November,
1983 at [3:57] P.M.

[Signature]
J.S.C.

APPENDIX I —
RETURN ON SEARCH WARRANT
DATED NOVEMBER 22, 1983

RETURN

STATE OF NEW YORK : COUNTY OF ERIE : ____ OF ____ :

I have executed the within Warrant as I am therein commanded on the [22nd] day of [Nov.], 19[83], by making a search in the place or ~~vehicle and of the person~~(s) designated in the said Warrant for the property therein described, and find of the said property the articles described in the following inventory, and one other of the articles described in said Warrant.

Dated: [Depew] New York this
[22nd] day of [November], 19[83] [Signature]
(Executing Police Officer)
[Det. Sergeant]

INVENTORY

INVENTORY of property taken by me by virtue of the within Search Warrant made publicly:

(list *all* times seized)

1. Cassette tape -TABOO
2. Cassette tape -TABOO
3. Cassette tape -BODY MAGIC
4. Cassette tape -FILTHY RICH
5. Cassette tape -LITTLE GIRLS BLUE
6. Cassette tape -DEEP THROAT
7. Cassette tape -TABOO II
8. Cassette tape -DEEP THROAT
9. Cassette tape -LITTLE GIRLS BLUE
10. Cassette tape -TABOO II
11. Cassette tape -ALL AMERICAN GIRLS
12. Cassette tape -EVERY WHICH WAY SHE CAN
13. Cassette tape -ALL AMERICAN GIRLS

14. One (1) New York Telephone bill
15. One (1) invoice — color blue (paper)
16. One (1) cassette movie list (paper)
17. One (1) package of business receipts in yellow envelope.

(IF ADDITIONAL SPACE IS REQUIRED; USE ADDITIONAL PAGES.)

Dated: [Depew], New York this
[22nd] day of [November], 19[83]

[Signature]
(Executing Police Officer)

OPPOSITION

BRIEF

No. 85-363

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

P.J. VIDEO, INC.
d/b/a/ NETWORK VIDEO
and JAMES ERHARDT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL JOHN CAMBRIA, JR., ESQ.
Attorneys for Respondents
Office and P.O. Address
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

MARY GOOD, of Counsel

TABLE OF AUTHORITIES

STATEMENT PURSUANT TO SUPREME COURT RULE 28(.1)

Respondent, P.J. Video, Inc. d/b/a Network Video does not have any parent companies, subsidiaries or affiliates.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

P.J. VIDEO, INC.
d/b/a/ NETWORK VIDEO
and JAMES ERHARDT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THIS CASE IS NOT APPROPRIATE FOR REVIEW SINCE NO SIGNIFICANT QUESTION OF FEDERAL LAW IS RAISED

In its effort to obtain certiorari, the Petitioner has misinterpreted to this Court the holding of the New York Court of Appeals. Any fair reading

of the case reveals that the Court simply applied well-established rules of state and federal constitutional law in determining that the affidavits in support of the warrant application did not establish probable cause to believe that a crime had been committed. Review of the Petitioner's argument reveals its misstatement and lack of substance.

The Petitioner cites as the Court's first error of constitutional dimension its supposed rejection of the probable cause standard, requiring instead that affidavits submitted in support of a search warrant actually establish that the targeted materials are obscene. That argument deliberately misinterprets the holding of the Court of Appeals. The court below merely ruled that applications for a search

warrant must be sufficient to establish probable cause to believe that the items in question are obscene, an inquiry which requires consideration of the materials as a whole. The quest for probable cause does not exist in a vacuum; there must be probable cause that a crime has been committed, in this case, the crime of obscenity.

Petitioner directs attention to language in the opinion which it claims supports its argument. For instance, it submits that the phrase, "to enable him to judge the obscenity of the film, not of isolated scenes from it", reveals the court's abandonment of probable cause in favor of a standard of proof beyond a reasonable doubt. The argument is unwarranted. Clearly, the Court's point and the thrust of the entire opinion is

that, in consideration of an obscenity warrant, the magistrate must, given the definition of obscenity, consider whether there is a probability that the whole of the work is obscene, not just what might be the more salacious sections. As the Court of Appeals put it, the task of the issuing magistrate in this case "was not to decide guilt or innocence, but to determine in a preliminary way from the information submitted and available to him whether there was probable cause to believe that the material to be seized was obscene within the tripartite definition of the statute" (A-5). Surely that language makes it evident that the Court of Appeals knew the appropriate standard of law and conscientiously applied it in a reasoned manner.

This case is solely about the sufficiency of the search warrant application, a question best left to the state courts. Nonetheless, the Petitioner maintains further that the Court's utilization of sound principles of federal constitutional law in deciding that issue was erroneous and that a new rule of law should obtain. Specifically, Petitioner says that the stricter level of scrutiny given a case involving protected expression is warranted only when there is the possibility that large volumes of materials will be confiscated or destroyed. The single citation in support of its theory is Maryland v. Macon, ___ U.S. ___, 105 S.Ct. 2778, a case which, far from undercutting established First Amendment analysis, reiterates those principles on which

this case hinges. This Court reemphasized in Maryland that the "First Amendment imposes special constraints on searchs for and seizures of presumptively protected material . . . and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances" Id. at ___ U.S. ___, 105 S.Ct. 2781. Mindful of that oft repeated rule, the New York Court of Appeals has done no more than apply it to the facts before it.

While the Petitioner may disagree with the Court's perception of what a sufficient affidavit should contain, its pique does not elevate this into a case reviewable by the Supreme Court. The Court of Appeals was guided both by this Court's definition of obscenity, as incorporated in New York

Penal Law §235.00 and its teaching that any search for or seizure of presumptively protected material should be undertaken only through a procedure designed to "focus searchingly on the question of obscenity" Marcus v. Search Warrants of Property, 367 U.S. 717, 732. Those guidelines led it to believe that "none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole" (A-6), a ruling well within the discretion of the state court.

Finally, the Petitioner claims that the decision below was specifically predicated upon federal constitutional mandates. While the Respondent agrees that the Court's application of Penal Law §235.00 necessitates reference to the Miller v. California, 413 U.S. 15,

definition of obscenity, it is not clear that the Court's interpretation of probable cause was not based upon the state constitution. The Court cites to both the Fourth Amendment and New York Constitution Article 1, Section 12 as well as the state statutory definition of probable cause found at Criminal Procedure Law §690.10. Since state courts are free to provide wider protection under their own constitutions and since the decision below may reflect such an attempt, there exists even less reason for the grant of certiorari sought. The necessary expenditure of judicial resources is not well justified when the decision simply entails an interpretation of the sufficiency of a search warrant application and as well rests upon state law.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL JOHN CAMBRIA, JR., ESQ.
Attorneys for Respondents
Office and P.O. Address
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

MARY GOOD, of Counsel

JOINT

APPENDIX

No. 85-363

In The

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

vs.

P. J. VIDEO, INC., d/b/a Network Video, and James Erhardt,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

JOINT APPENDIX

RICHARD J. ARCARA
District Attorney of Erie County
Counsel for Petitioner
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202
Telephone: (716) 855-2424

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
Paul John Cambria, Jr., Esq.
Counsel for Respondents
One Niagara Square
Buffalo, New York 14202
Telephone: (716) 849-1333

PETITION FOR CERTIORARI FILED AUGUST 30, 1985.
CERTIORARI GRANTED OCTOBER 21, 1985.

Daily Record Corporation
Rochester, New York

(12113)

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DOCUMENTS REPRODUCED IN PETITION FOR CERTIORARI

DOCKET ENTRIES

11/21/83	Search warrant application granted [see Petition for Certiorari, Appendix G]
11/21/83	Accusatory instruments signed
11/22/83	Return on Search Warrant signed [see Petition for Certiorari, Appendix I]
1/3/84	Omnibus Motion on behalf of James Erhardt and P.J. Video, Inc. d/b/a Network Video
2/10/84	Responding Affidavit on behalf of People of the State of New York
2/23/84	Memorandum Decision of Hon. Henry Wick, Village of Depew Village Court [see Petition for Certiorari, Appendix E]
3/23/84	Order of Hon. Henry Wick, Village of Depew Village Court [see Petition for Certiorari, Appendix F]
3/30/84	Notice of Appeal
9/20/84	Memorandum Decision of Hon. Rose D. LaMendola, Erie County Court [see Petition for Certiorari, Appendix C]
10/3/84	Order of Hon. Rose D. LaMendola, Erie County Court [see Petition for Certiorari, Appendix D]
11/27/84	Order of Hon. Matthew J. Jasen granting leave to appeal to New York Court of Appeals
7/5/85	Opinion and Remittitur of New York Court of Appeals [see Petition for Certiorari, Appendices A and B]
10/21/85	Order of United States Supreme Court granting Petitioner's Writ of Certiorari.

OMNIBUS MOTION — JAMES ERHARDT AND P.J. VIDEO, INC. d/b/a NETWORK VIDEO

Defendants' Joint Affidavit dated January 30, 1984, pp. 17-38.

* * *

SUPPRESSION OF ILLEGALLY SEIZED EVIDENCE

49. Counsel through Demands for Discovery and Inspection has requested the People to disclose whether any evidence has been acquired through searches and seizures aside from that acquired by virtue of the search warrant issued on November 21, 1983 and executed on November 22nd. It is requested that this Court order the People to produce any other search warrant, and/or arrest warrant which may have been used to acquire any information to be used by the People at trial.

50. Should counsel become aware of the improper or unlawful acquisition of any such evidence or information and should counsel have reasonable cause to believe that this evidence/information may be offered against the defendants at trial, I will immediately move to suppress such evidence pursuant to CPL §§ 710.20 and 710.40.

MOTION TO SUPPRESS SEARCH WARRANT DATED NOVEMBER 21, 1983

51. On November 21, 1983 Hon. Theodore S. Kasler, Supreme Court, Erie County, issued a search warrant which allegedly authorized the Village of Depew Police Department "to make a search of the premises located at NETWORK VIDEO, 5868 Transit Road, Depew, New York . . ." (Annexed hereto as Exhibit "I" is a copy of said search warrant.

52. The search warrant purportedly authorized the seizure of "any personal papers or documents which tend to identify the owner, lessee, or whomever has custody or control over the premises . . ." and the following video cassette movies:

(a) California Valley Girls

(b) Taboo II

(c) Taboo

(d) All American Girls

(e) Debbie Does Dallas

(f) Body Magic

(g) Deep Throat

(h) Every Which Way She Can

(i) Filthy Rich

(j) Little Girls Blue

53. The warrant was purportedly based upon the application of Sergeant Vance Scioli dated November 21, 1983 (Annexed hereto as Exhibit "J"), the affidavit of Erie County Sheriff Deputy Vincent Costanza (Annexed hereto as Exhibit "K"), and ten affidavits prepared by Investigator David Groblewski of the Erie County District Attorney's Office (Annexed hereto as Exhibits "L" through "U" are copies of said affidavits).

54. As a result of the execution of this warrant on November 22, 1983 the premises indicated were searched and the items detailed in the Inventory/Return filed by Detective Scioli on November 22nd were seized (Annexed hereto as Exhibit "V").

55. Additionally, based upon your deponent's review of the inventory, as well as conversations had with various persons who were present at the time the warrant was executed, as well as my personal knowledge regarding the facts and circumstances regarding the seizures of November 22nd, a number of items not authorized by the search warrant were seized. The proprietariness of these warrantless searches and seizures will be considered under separate headings, *infra*.

56. Based upon the allegations set forth in the Informations filed with this Court there is reasonable cause to believe that the materials seized pursuant to this blatently [sic] defective search warrant will be utilized against each defendant at trial.

57. Each defendant here clearly has standing as a matter of law to challenge the searches and seizures which resulted in the seizure of the video tapes and other evidence. The corporation, P J Video, undoubtedly has standing to contest the search of its business premises especially those which lead to the seizure of property in which the corporation has a recognized and legitimate property interest. *See Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920). In this regard, Video Enterprises, Inc. respectfully asserts that it is the authorized lessee of the video cassettes seized, the owner of the other property seized and the lessee of the premises searched.

58. It is further evident that the defendant James Erhardt has standing as a matter of constitutional law to contest the searches and seizures conducted since he was present at time of the search and has a recognized, legitimate expectation of the privacy in the area of the search.

59. Thus, based upon the documents contained in Exhibits "I" through "V" respectively, the defendants each move pursuant to, *inter alia*, Article 710 of the Criminal Procedure Law, for the sup-

pression of any and all evidence obtained as a result of the execution of this blatently [sic] defective search warrant on the grounds that the searches and seizures were conducted in violation of their rights under the First, Fourth and Fourteenth Amendments of the United States Constitution as well as Article I, Sections 8 and 12 of the New York State Constitution and the specific provisions of Article 690 of the Criminal Procedure Law.

SEARCH PURSUANT TO WARRANT
DATED NOVEMBER 21, 1983

60. It is respectfully submitted that the search warrant here was issued in the absence of a legally sufficient showing of probable cause presented either pursuant to CPL § 690.35 or 690.40 which conclusively demonstrated a reasonable belief that property of the kind and character described in CPL § 690.10 could be found in or about the designated premises. Additionally, it is submitted that the procedures engaged in by Judge Kasler prior to the warrant's issuance did not adequately afford him the opportunity to "focus searchingly" upon the issue of obscenity.

61. It is well established that at the very core of the protection afforded by the Fourth Amendment, as well as Article I, Section 12 of the New York State Constitution, is the requirement that the neutral, detached, informed and independent judgment of a judicial officer be interposed between law enforcement agents and the citizenry at large (*Arkansas v. Sanders*, 442 U.S. 753 [1979]; *Connally v. Georgia*, 429 U.S. 245 [1977]; *United States v. United States District Court, E.D.Mich.*, 407 U.S. 297 [1972]; *Monserrate v. Upper Court Street Bookstore, Inc.*, 49 N.Y.2d 306, 425 N.Y.S.2d 304 [1980]; *People v. Potwora*, 48 N.Y.2d 91, 421 N.Y.S.2d 850 [1979]).

62. This requirement of neutrality, independence and detachment is especially mandated in those instances where things to be seized are video tapes and the justification for this seizure their

content. The Supreme Court of the United States has long recognized that the protections guaranteed by both the First and Fourth Amendments have long been inextricably linked so as to insure the free and untrammeld [sic] expression of ideas in our society. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965); *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 729-731 (1961).

63. Where, as here, the First Amendment concerns are intertwined with Fourth Amendment commands, the Court must engage in using the most "sensitive tools available" (*Speiser v. Randall*, 357 U.S. 513, 525 [1958]) to minimize, as much as possible, any restriction or ban upon the dissemination of materials presumptively protected by the First Amendment, regardless of duration.

64. Accordingly, any seizure of materials presumptively protected is governed by a special set of Fourth Amendment rules which are not normally associated wich [sic] other types of alleged "contraband". *See Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 483 (1973); *Stanford, supra; A Quantity of Books, supra; Marcus, supra.*

65. Although it is settled that the First Amendment does not protect "obscenity" (*Miller v. California*, 413 U.S. 15 [1973]), special care must be exercised by the Court so that constitutionally protected materials are not seized.

66. However, since the line separating the "obscene", and thus unprotected, from the "non-obscene" is dim and uncertain at best (*Jacobellis v. Ohio*, 378 U.S. 184, 187 [1964]; *Bantam Books Inc. v. Sullivan*, 373 U.S. 58, 66 [1963]) there *must be a procedure prior* to seizure designed to afford a neutral and detached magistrate personally to "*focus searchingly* on the question of obscen-

ity" (*A Quantity of Books,* 378 U.S. at 210; *Marcus,* 367 U.S. at 732; *United States v. Tupler,* 564 F.2d 1294, 1297 [9th Cir. 1977]). See also, *People v. Potwora,* 48 N.Y.2d 91, 95, 425 N.Y.S.2d 850, 853 (1980) ("Issuing Magistrate must conduct a 'full and searching inquiry' into the facts on which the warrant application is based").

67. Indeed, the law is well-settled in New York that unless the issuing magistrate himself has *personally reviewed* the materials *vis-a-vis* the question of obscenity *prior* to the issuance of the warrant, any search and seizure conducted is *per se* unconstitutional and violative of the First and Fourth Amendments of the United States Constitution as well as the corresponding provisions of the New York State Constitution (*Potwora,* 48 N.Y.2d at 96, 421 N.Y.S.2d at 853; *Avasino,* 338 N.Y.S.2d at 79).

68. In *Potwora,* the Court of Appeals specifically ruled that any procedure for the issuance of a search warrant which does not provide for the personal determination by the magistrate based upon the *facts* presented to him that probable cause exists renders all searches and seizures conducted thereunder constitutionally invalid.

69. In *Potwora,* the warrant authorizing the search and seizure of materials presumptively protected by the First Amendment was based upon an affidavit of a State Police Officer that three unnamed magistrates had reviewed the magazines for which a search warrant was requested and had found them to be obscene.

70. Even though the Court of Appeals did not question the veracity of the Police Officer's statements, they ruled that such a procedure did not "interpose the detached and independent judgment of a neutral Magistrate between the police officers and the citizenry (*People v. Hanlon,* 36 N.Y.2d 549, 558, 369 N.Y.S.2d 677, 683 . . .; see, also, *United States v. Lefkowitz,* 285

U.S. 452, 464 . . .)." (*Potwora,* 48 N.Y.2d at 94, 421 N.Y.S.2d at 853.)

71. Specifically, the Court observed that:

> "[I]t is clear that the issuing Magistrate himself, if he is to fulfill the constitutionally mandated function of interposing an independent intelligence between the law enforcement officer and the citizen, *must actually and in fact, draw the inferences from the evidence presented to him.* It is for this reason that the Courts have insisted that the full facts from which inferences might be drawn, and the information necessary to determine their reliability, be placed before the issuing Magistrate . . ." (*Potwora,* 48 N.Y.2d at 94, 421 N.Y.S.2d at 853; citations omitted) (emphasis supplied).

72. Thus, since in *Potwora* the issuing Magistrate failed to personally exercise his own independent judgment regarding the materials for which the search warrant was sought, and draw whatever inferences *vis-a-vis* the question of obscenity were permissible, the search warrant was invalidly issued. The Court of Appeals, thus, laid down the following rule to be utilized in such instances:

> "[It is a] fundamental requirement that a neutral and detached magistrate make *an independent determination* of probable cause [and such requirement] is *not* fulfilled unless the issuing magistrate himself conducted a *full and searching inquiry* into the facts on which the warrant application is based. This obligation is one which *may not be delegated in part or in whole regardless of the qualifications of the persons on whom reliance is placed.* Thus, it would be improper to share the required determination even with another judge of the same jurisdiction who, if application were properly made, would be equally empowered to issue the warrant sought" (*Id.* at 95-96, 421 N.Y.S.2d at 853; emphasis supplied).

73. Thus, it is clear that under New York law before a search warrant may be issued regarding materials presumptively pro-

tected under the First Amendment, which the video tapes in this case indisputably are (*Interstate Circuit v. Dallas,* 390 U.S. 676 [1968]; *Kingsley Picture Corporation v. Regents,* 360 U.S. 684 [1959]; *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 [1952]; *Monserrate,* 49 N.Y.2d at 306, 425 N.Y.S.2d at 304), two distinct procedures must be engaged in by the issuing Magistrate *prior* to the authorizing a search warrant:

> (a) the issuing Magistrate must himself personally review the facts (i.e., the materials themselves) upon which he is called to render a judgment of probable cause; and
>
> (b) the inquiry must "focus searchingly" on the issue of "obscenity".

74. In this case, it is clear that Justice Kasler *did not* personally review the video tapes but instead unconstitutionally delegated his duty of examining the full facts regarding the film's obscenity to various law enforcement officers. By accepting Investigator Groblewski's statements regarding the alleged "content and character of the video tapes, Justice Kasler failed to determine whether probable cause existed to believe that:

> "The *average person,* applying contemporary [*statewide*] community standards, would find that considered as a whole, its predominent appeal is to the *purient interest* in sex . . . that it depicts or describes in a *patently offensive manner,* actual or simulated: sexual intercourse, sodomy, sexual beastiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals and . . . *considered as a whole* it *lacks serious* literary, artistic, political and scientific value" (*Miller,* 413 U.S. 24; Penal Law § 235.00 [1]; emphasis supplied).

75. Here, Judge Kasler allowed Investigator Groblewski to determine whether probable cause existed to believe that the films were obscene — a determination which our Courts have long recognized is a matter of personal taste and *must be* performed by a

neutral and detached Magistrate, not a law enforcement officer. *See Potwora, supra; People v. Abronovitz,* 31 N.Y.2d, 160, 165, 335 N.Y.S.2d, 279, 282 (1972); *People v. Rothenberg,* 20 N.Y.2d 35, 39, 281 N.Y.S.2d 316, 318; *People v. Hughes,* 31 A.D.2d 225, 296 N.Y.S.2d 671 (4th Dept. 1962).

76. Thus, since under the law of New York, a judicial officer cannot delegate the question of determining obscenity to a fellow judge, then he cannot delegate that same authority to a police officer. As a matter of constitutional law, then, since the procedures utilized by Judge Kasler here failed to afford a prior determination by a neutral and detached judicial officer who, in fact, actually reviewed the materials (the films) and focused searchingly upon the question of obscenity, the search warrant was invalidly issued and any and all materials seized thereunder must be suppressed.

77. Wherefore, for all the foregoing arguments and authorities, as well as those to be submitted at the time of oral argument, it is submitted that this Court must suppress the search warrant and grant to the defendants such other, further and different relief as is just and proper under the circumstances.

FACIAL INVALIDITY OF THE SEARCH WARRANT

78. The search warrant must be further suppressed since it contains a number of facial defects. In clear contradiction to the explicit command of CPL § 690.45(4), this warrant does not contain a *specific* and *particular* description of all the items which are subject to seizure. Rather, the search warrant contains a vague reference to "any papers" and thus violates not only Article 690 of the First, Fourth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the New York State Constitution. *See Stanford v. State of Texas,* 379 U.S. 476, 485 (1965).

79. In effect the present warrant delegated to the police officers the initial task of determining whether the material in question was subject to seizure and not, as the Constitution requires, that a neutral and detached Magistrate make this determination. In fact, warrants which have failed to contain particularized descriptions of the materials to be seized have never been upheld by any court since they are constitutionally infirm. *See Lo-Ji Sales, Inc.*, 443 U.S. at 332; *Stanford*, 379 U.S. at 485; *Marcus*, 367 U.S. at 731; *Abronovitz*, 31 N.Y.2d at 163, 335 N.Y.S.2d at 281; *Rothenberg*, 20 N.Y.2d at 38, 281 N.Y.S.2d at 317.

80. The warrant here is impermissibly vague in that it authorized the executing officers to search the premises in question for "any personal papers or documents which tend to identify the owner, lessee or whomever has custody or control over the premises . . ." This vague authority, in effect, gave the executing officers a "roving commission" to conduct a limitless search of the Network Video Store and to seize any documents which, in their sole opinion, related to the ownership of the premises.

81. The warrant then delegated to the police officers the initial task of determining whether the materials seized were covered by the search warrant which, of course, is not countenanced by Article 690 nor the various constitutional provisions. In fact, there is nothing contained in supporting affidavits of Sergeant Costanza or Investigator Groblewski which indicate, in the slightest, that such papers would be found on the premises. There is absolutely no allegation of fact set forth which supports any conclusion that there is reasonable cause to believe that there would be any business records, documents, etc. at the premises nor that said document would tend to demonstrate that a particular person participated in the commission of the offense designated in the warrant. For this reason alone, then, the warrant is clearly facially defective and any seizures conducted thereunder must be suppressed.

82. It is submitted that the inclusion of this authorization to seize business documents was merely a subterfuge which enabled the executing agents to conduct a general, exploratory search of the Network Video store in a hope of undercovering some evidence of a crime. Such a general search, however, has been continuously condemned by the United States Supreme Court and the Courts of this State. It is thus respectfully submitted that this Court must suppress all seizures under the warrant less it too become a party to such questionable police tactics.

83. Further, upon information and belief, the source of said information and grounds for said belief, the police conducted a massive seizure of presumptively protected materials without affording the defendant an adversarial hearing prior to the seizure.

84. In this case, it is evident that the warrant was not executed for the purpose of obtaining a copy of the relevant firms to be used for evidence as is countenanced by *Heller v. New York*, 413 U.S. 483 (1973). Rather, the executing officer seized multiple copies of various named films and have retained their custody and control until the present date thus resulting in a prior restraint upon the defendants' ability to continue to promote these films until a neutral and detached judicial officer finds that they are legally obscene.

85. In fact, based upon your deponent's review of the relevant warrant application and affidavit, it is clear that prior to obtaining the search warrant in this case the District Attorney's Office had in its possession one copy of each film for which the warrant authorized seizure. It is believed that this copy was retained by the District Attorney's Office for utilization as evidence in this case.

86. Thus, it is submitted that any further seizures of other copies of the named films, in effect, resulted in the type of massive

seizure continuously condemned by the Courts especially where, as here, a prior adversarial hearing regarding the film's obscenity was not conducted. *See, Stanford, supra; A Quantity of Books v. Kansas; Marcus v. Search Warrant, supra.*

87. Accordingly, based upon the foregoing reasons and authorities, as well as those submitted at time for oral argument, it is submitted that the search warrant herein is constitutionally infirm and, thus, any and all materials seized thereunder must be immediately returned and any and all evidence or information derived therefrom, either directly or indirectly, must be suppressed.

APPLICATION OF VANCE SCIOLI

88. The Scioli application consists of three numbered paragraphs which allegedly provide probable/reasonable cause for the search of P J Video.

89. In paragraph 2 of his application, Sergeant Scioli alleges that he received information from Sgt. Costanza and Investigator Groblewski. Yet, Scioli fails to state, even in conclusory terms, the nature of the information obtained. Thus, it is clear that as a matter of constitutional law the application does not provide a proper basis for the issuance of the warrants since it consists solely of conclusions.

90. Since it is clear that the Scioli application is constitutionally infirm, we must then examine the supporting affidavits of Costanza and Groblewski to determine whether they could constitutionally provide probable cause for the warrant.

AFFIDAVIT OF VINCENT COSTANZA

91. Sergeant Costanza's affidavit consists of five unnumbered paragraphs which allegedly provide the basis for the search warrant. Upon examination, however, it is clear that the affidavit is insufficient as a matter of law to provide probable/reasonable cause.

92. In paragraph 2 of his affidavit, Sergeant Costanza alleges that he rented various video cassettes from the P J Video Store located at 5868 Transit Road. It is submitted that the information contained in this portion of the affidavit cannot form a basis for the search warrant.

93. It is clear that each of the video cassettes was rented at least fifty-two days prior to the warrant's execution. However, there is nothing contained in the Costanza Affidavit which affirmatively establishes that the rented films would still be there when the warrant was executed and thus this information is too stale as a matter of law.

94. It is clear that before reasonable/probable cause to be deemed to exist, the underlying factual allegation *must be* closely related in time to the date of the warrant's execution to insure a reasonable person that the property subject to seizure would be found when the warrant was executed (*Sgro v. United States,* 287 U.S. 206, 210 [1932]; *People v. Loewell,* 50 A.D.2d 483, 378 N.Y.S.2d 521, 525 [4th Dept. 1976] *aff'd* 41 N.Y.2d 609, 398 N.Y.S.2d 591 [1977]).

95. Here, however, the information is between fifty-two and sixty-two days old and is thus too stale to provide a proper basis for the warrant.

96. In paragraph 3, Costanza alleges that he turned the video cassettes over to Investigator Groblewski of the District Attor-

ney's Office for "copying". Based upon information and belief, the source of said information and grounds for such belief being your deponent's conversations with representatives of the persons and corporations which hold the copyrights to the films named, the District Attorney's Office did not have the authority, either explicitly or implicitly, to make these copies. This unauthorized copying, then, constitutes an infringement of the copyrights (*See Arnstein v. Broadcast Music,* 137 F.2d, 410 [2nd Cir. 1943]); 17 U.S.C. § 501) rendering the subsequent use of this copy in the warrant application illegal.

97. It is further submitted that these unauthorized copies were reviewed by Groblewski as a basis for his affidavit thus tainting the entire warrant process.

98. It is submitted that this unauthorized copying of the films also constitutes a larceny under New York law (*See People v. Marra,* — Misc.2d — Sup. Ct., Queens County, slip opn. *N.Y. Law Journal,* p. 16 [Dec. 1, 1983]). This "stealing" and unauthorized copying of the films, then, invalidates the entire warrant process and mandates suppression. *See Walter v. United States,* 447 U.S. 649 (1980); *People v. Abruzzi,* 52 A.D.2d 499, 385 N.Y.S.2d 94 [2nd Dept. 1976]).

99. It is additionally submitted that this unauthorized copying of the video tapes constitutes a warrantless "search" of the films' contents which is not justified by any known exception to the warrant requirement. (See, *Walter,* 447 U.S. at 654).

100. In fact, in this State, it is well settled that the retention of visual surveillance constitutes a "search" and "seizure" within the meaning of the Fourth and Fourteenth Amendments of the United States Constitution as well as Article I, Section 12 of the New York State Constitution. *See People v. Teicher,* 90 Misc.2d 638, 395 N.Y.S.2d 587, 590 (Sup. Ct. N.Y. Co. 1977); *People v.*

Terrell, 53 Misc.2d 32, 277 N.Y.S.2d 926, 935 (S.Ct. Bronx County 1967) *aff'd* — A.D.2d — , 291 N.Y.S.2d 1002 (1st Dept. 1968).

101. Here, this copyright infringement and larceny of the contents of these films and their utilization in obtaining the search warrant, without prior judicial approval for said procedure, taints the entire application and mandates suppression.

102. In paragraph 4 of his affidavit, Costanza alleges that on November 17th he obtained a list of films allegedly "available" from the Network Video Store from James Erhardt. There is nothing contained in the affidavit, however, which indicates in the slightest that films other than those he rented would be available or could be found on the premises. Thus, this portion of the affidavit cannot provide probable/reasonable cause for the seizures of films that Costanza did not rent nor personally observe on the premises. Thus, probable reasonable cause for their seizure cannot exist.

103. Lastly, the Costanza affidavit absolutely fails to present any facts which at all support the issuance of a warrant which authorizes the seizure of personal papers relating to ownership. There is no allegation of fact set out in the affidavit which supports any conclusion that there is reasonable cause to believe that there would be any business records, documents, etc. at Network Video premises nor that said documents would tend to demonstrate that a particular person participated in the commission of the offense designated in the search warrant. The warrant is thus defective in this regard and the seizure of the business records must be suppressed.

AFFIDAVITS OF DAVID GROBLEWSKI

104. Investigator Groblewski of the District Attorney's Office has submitted ten affidavits which purport to contain his "review" of the various films. It is submitted, as a matter of law, that these affidavits are insufficient to provide a basis for the search warrant.

105. To begin with, as counsel has previously asserted in these motion papers, since Investigator Groblewski is only relating his observations of the films, the application cannot constitutionally justify the issuance of a warrant since a neutral and detached Magistrate must himself personally observe the films.

106. Secondly, even if a police officer were able to relate the film's content to a court for the purposes of issuing a search warrant (he cannot) the affidavits here fail to contain any facts from which a reasonable person would be warranted in concluding that the films are "obscene".

107. Although the movies vary in length from eighty minutes to ninety minutes, the Groblewski affidavits attempting to describe their content and character range from eleven lines ("All American Girls", "Taboo", "Body Magic") to twenty-six lines (for the film "Deep Throat").

108. This sort of conclusuory, ambiguous description of the films clearly leaves out significant and substantial portions and thus the issuing Magistrate is prevented from determining whether the films as a *whole* are obscene within the meaning of *Miller,* and Penal Law § 235.00(1).

109. Thirdly, it is apparent that Investigator Groblewski merely focused upon the alleged portrayal of certain sexual activity without attempting to describe the entire content and character of the films, the dialogue, the method of presentation, etc.

The procedure utilized by Groblewski, and in turn by Justice Kasler, then was the type of determination long condemned by the Courts of this State since it is clear that the focus was only upon certain specified "illicit activity". *See People v. Bookcase, Inc.,* 14 N.Y.2d 409, 252, N.Y.S.2d 433 (1964); *Excelsior Picture Corporation v. Regents,* 3 N.Y.2d 237, 165 N.Y.S.2d 42 (1952); *Calederon v. City of Buffalo,* 90 Misc.2d 1033, 397 N.Y.S.2d 655 (S.Ct. Erie County 1977) *aff'd* 61 A.D.2d 323, 402 N.Y.S.2d 685 (4th Dept. 1978); *People v. Stabile,* 58 Misc.2d 905, 296 N.Y.S.2d 815 (Criminal Ct. N.Y.C. 1969) (cited provingly in *People v. Heller,* 33 N.Y.2d 314, 353 N.Y.S.2d 601 (1973).

110. It is further submitted that the Groblewski affidavit cannot constitutionally supply probable cause for the issuance of a warrant that seeks materials presumptively protected by the First and Fourteenth Amendments as well as by Article I, Section 8 of the New York State Constitution. There is no indication in the affidavit that Investigator Groblewski even attempted to apply the standard of obscenity mandated by *Miller* and by Penal Law § 235.00(1). There is no statement that Groblewski viewed the entire film and that taken as a whole, the film's predominent appeal is to the prurient interests of sex; that the average person applying statewide community standards would find that the predominant appeal is to be the prurient interest in sex; that they depict or describe in a patently offensive manner actual or simulated sexual intercourse, sodomy, sexual beastiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals; and, that the films lack serious literary, artistic, political and scientific value.

111. It is submitted that Investigator Groblewski, as a police office, is constitutionally incompetent to make such a determination. Thus, the affidavit is constitutionally infirmed and must be suppressed.

RESPONDING AFFIDAVIT —
PEOPLE OF THE STATE OF NEW YORK

Dated February 10, 1984, pp. 4-6

* * *

12. THE SEARCH WARRANT

A. The defendant's motion to controvert the search should be denied since it was issued upon probable cause by a neutral and detached m[illegible] JUDGE KASLER made the determination based on th[illegible]its of Investigator GROBLEWSKI, Sgt. COSTANZA and Sgt. SCIOLI that the video tapes were obscene. The affidavit of Investigator GROBLEWSKI described the contents of the films in objective factual terms. It was the magistrate and not the investigator who determined that there was probable cause to believe the tapes were obscene.

B. The warrant describes in clear and unambiguous language the tapes which were to be seized. There is no reference merely to "any papers" but only to those which tend to identify the owner, lesee or whomever has custody or control of the premises. Since such proprietary documents are routinely within the immediate environs of the locus of the search, especially in business establishments, such language is neither overbroad nor does does it authorize an exploratory search.

C. The combined affidavits of Detective SCIOLI. Sgt. COSTANZA and Investigator GROBLEWSKI all provide sufficient probable cause for the issuance of the warrant.

D. Since all of the films are part of an ongoing inventory at 5568 Transit (see list), there was reasonable cause to believe that the films would be there when the warrant was executed.

13. The defendant's motion to prohibit the People from introducing information requested in its Discovery Demand and Bill of Particulars is baseless.

A. The defendant appeared before JUDGE WICK on or about December 14, 1983, and requested a two-month adjournment to February 15, 1984, for motions.

The defendant's attorney specifically states on page 2 of his own motion dated January 30, 1984, "The matter was then adjourned until February 15, 1984 to allow your deponent to file any and all available pre-trial motions in this matter."

On January 19, 1984, approximately one month before the motion date, the People responded to the defendants' Discovery Demands and invited the defense to make an appointment to inspect those materials to which they are entitled. To date, your deponent is aware of no such effort on the part of the defense. How the defendant can request a lengthy adjournment for its own convenience and then complain that the People have not timely responded when in fact we had, well in advance of the return date, defies reason. The defendants' motion should in all respects be denied.

[Signature]
THOMAS P. FRANCZYK

Sworn to before me this
10th day of February, 1984.
[Signature]
Notary Public
State of New York, Erie County
My Commission Expires March 30, 1984.

PETITIONER'S

BRIEF

(4)

No. 85-363

In The

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

vs.

P.J. VIDEO, INC., d/b/a Network Video, and James Erhardt,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR PETITIONER

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32pp

QUESTIONS PRESENTED

1. Did the New York Court of Appeals err in determining that the United States Constitution requires that a warrant authorizing the evidentiary seizure of allegedly obscene materials be supported by a factual showing establishing *more* than probable cause?

2. Did the New York Court of Appeals misinterpret the decisions of this Court in the present case by applying a standard pertinent only to seizures shown to constitute a prior restraint?

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Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR PETITIONER

OPINIONS BELOW

In an opinion reported at 65 N.Y.2d 566, the New York Court of Appeals, with one judge dissenting, affirmed the order of the Erie County Court granted on October 3, 1984. The memorandum of the Erie County Court (LaMendola, J.), dated September 20, 1984, which affirmed the order of the Village of Depew Village Court entered March 23, 1984, is not reported and can be found at A-30 of the appendix to the petition for certiorari. The decision of the Village of Depew Village Court (Wick, J.) dated

February 23, 1984 is also not reported and can be found at A-35 in the appendix to the petition for certiorari.

JURISDICTION OF THIS COURT

On July 5, 1985 the New York State Court of Appeals determined that a search warrant cannot be issued for the seizure of allegedly obscene materials presumptively protected by the First Amendment to the United States Constitution without a judicial determination that the materials sought are *in fact* obscene. This holding is repugnant to the First and Fourth Amendment precepts as interpreted by this Court. The jurisdiction of this Court is thus invoked under 28 U.S.C. §1257(3).

The petition for writ of certiorari to the New York Court of Appeals was timely filed pursuant to Rule 20 of the Rules of the Supreme Court on August 30, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PENAL LAW

§235.00 Obscenity; definitions of terms.

1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest whether through the medium of reading, observation, sound or in any other manner.

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4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

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§235.05 Obscenity in the third degree.

A person is guilty of obscenity in the third degree when, knowing its intent and character, he:

1. Promotes, or possesses with intent to promote, any obscene material;. . .

Obscenity in the third degree is a class A misdemeanor.

NEW YORK STATE CRIMINAL PROCEDURE LAW
§690.35 Search warrants; the application.

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2. The application must contain:

(b) A statement that there is reasonable cause to believe that property of a kind or character described in section 690.10 may be found in or upon a designated or described place, vehicle or person;. . .

§710.20 Motion to suppress evidence; in general; grounds for.

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant;. . .

STATEMENT OF THE CASE

On November 21, 1983, Detective Vance Scioli of the Village of Depew Police Department applied to the New York Supreme Court, Erie County, for a warrant authorizing the seizure of ten video cassettes entitled "California Valley Girls," "Taboo II," "All American Girls," "Debbie Does Dallas," "Body Magic," "Deep Throat," "Every Which Way She Can," "Filthy Rich," "Little Girls Blue" and "Taboo." The premises at which the cassettes were expected to be found was described as Network Video, a store located in the Village of Depew engaged in the business of selling, renting and servicing video equipment and cassettes. Attached to Scioli's warrant application were an affidavit from Detective Sergeant Vincent Costanza of the Erie County Sheriff's Department and ten affidavits from David J. Groblewski, an investigator from the Erie County District Attorney's Office.

Costanza deposed that he had rented five of the named cassettes from Network Video in Depew and that the other five named cassettes were available for rental from that establishment according to an "Adult Cassette Movie List" obtained from the store and annexed to Costanza's affidavit. Costanza had previously rented the latter five cassettes from other video rental stores, three from a Network Video store located elsewhere, and two from a store called Video Vision.

Groblewski deposed in each of his ten affidavits that he had viewed a particularly entitled cassette which had been rented by Costanza. The investigator then summarized in detail the "content and character" of each cassette.

On November 21, 1983, the Hon. Theodore S. Kasler, a justice of the New York Supreme Court, issued a warrant authorizing seizure of the ten cassettes named in Detective Scioli's application from Network Video. Pursuant to the warrant, thirteen video cassettes were seized, i.e., one copy of "Body Magic," "Filthy Rich" and "Every Which Way She Can," and two copies of "Taboo," "Little Girls Blue," "Deep Throat," "Taboo II" and "All American Girls." No copies of the other named cassettes were seized.

Following execution of the warrant, P.J. Video, doing business as Network Video, and James Erhardt were charged with multiple counts of the crime of Obscenity in the Third Degree (New York Penal Law § 235.01). Defendants thereafter moved to suppress use of the films in the criminal prosecution. In a decision dated February 23, 1984 by the Hon. Henry S. Wick, Justice of the Village Court of Depew, "any and all" evidence seized pursuant to Justice Kasler's warrant was suppressed. The court held essentially that the issuing magistrate improperly delegated his duties by relying upon the investigator's viewing of the cassettes. An order pursuant to the village court's decision was entered on March 23, 1984.

The matter was appealed on behalf of the People of the State of New York to the Erie County Court, where, in a decision dated September 24, 1984, the Hon. Rose D. LaMendola affirmed the court below, holding that "the issuing magistrate failed to make an adequate finding of probable cause for the issuance of the warrant because he relied solely upon the affidavits of the police officers without further investigation or viewing of the materials

to be confiscated." An order comporting with the memorandum was entered on October 3, 1984.

A further appeal on behalf of the People was taken to the New York Court of Appeals which affirmed the order of the county court. In an opinion written by the Hon. Richard D. Simons, issued on July 5, 1985, the court rejected the proposition that a magistrate need view a film or even part of it prior to the approval of a warrant. Nevertheless, the court found that the affidavits in this case were insufficient to support a warrant authorizing seizure of material presumptively protected by the First Amendment. The Hon. Matthew J. Jasen dissented arguing that the majority had improperly instituted a requirement that more than probable cause be shown for issuance of a warrant authorizing the seizure of allegedly obscene materials.

The People petitioned this Court for a Writ of Certiorari to the New York Court of Appeals. The petition was granted on October 21, 1985.

SUMMARY OF ARGUMENT

The New York Court of Appeals erred in its conclusion that the seizure of the video cassette recordings in the present case violated the United States Constitution. There is no legal basis for the court's apparent determination that proof beyond probable cause need be provided upon an application for a warrant authorizing the seizure of presumptively protected materials for evidentiary purposes. Nor was it correct for the court to apply constitutional standards pertinent to mass seizures and final restraints to the present case since the circumstances here do not establish that any significant restraint upon the freedom of expression occurred.

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* Numbers in parentheses preceded by A refer to pages in Petition for Writ of Certiorari.

The Fourth Amendment requires that searches and seizures be conducted pursuant to court issued warrants based upon probable cause. A warrant authorizing the seizure of allegedly obscene materials for evidentiary purposes is dependent upon proof demonstrating the probable obscenity of the materials sought to be seized. Contrary to the conclusion of the Court of Appeals, the Constitution imposes no burden upon the warrant applicant to demonstrate the "obscenity" of the materials in question or to show that they "are not entitled to constitutional protection" (A7).

The affidavits in the present case were sufficient to support the issuing magistrate's conclusion as to the probable obscenity of the video cassettes. As conceded by the Court of Appeals, the sexual acts described in the affidavits were offensive by any constitutional standard (A6). The affidavits demonstrated that the films' predominant appeal was to the prurient interest in sex in that the summaries of each film's content are dominated by references to the sexual activity portrayed. Further, there is no explicit or implicit indication in the affidavits that any of the movies possessed literary, artistic, political, or scientific value.

Many courts have determined that a magistrate can base his determination of probable cause upon review of non-conclusory affidavits describing allegedly obscene materials rather than upon his personal viewing or examination of the materials sought to be seized as evidence. Burdening the judiciary by requiring that hours be expended reviewing every frame of every film where the judicial responsibility is only to determine "probable" obscenity is both impractical and unnecessary especially in cases such as the one at bar where no mass seizure nor final restraint was sought.

Not only did the warrant issue upon probable cause as required by the Fourth Amendment, but in addition there existed adequate safeguards to protect against violation of individual rights under the First Amendment. Of the ten designated films

authorized to be seized only eight titles were available upon execution of the search. Of the eight, only one or two copies were taken. None of the other twenty similarly advertised cassettes were removed from the video store premises. The defendants were not enjoined or in any sense prevented from continuing to sell or rent other copies of the movies which were seized. Nor were they prevented from re-stocking the titles removed by the police assuming that those taken were all that were then in the possession of the defendants. The defendants were entitled to copy the movies seized if such was felt to be necessary to their commercial purposes or to challenge the determination of probable obscenity at a post-seizure hearing (*Heller v. New York*, 413 U.S. 483).

Additionally and perhaps most importantly there was available to the defendants a mechanism for determining whether the affidavit descriptions affixed to the application for the search warrant truthfully delineated the content and character of the films contemplated for seizure. Upon the defendants' assertion that the affiant had omitted or recklessly disregarded significant portions of the films bearing upon the probable obscenity issue, a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, could have been ordered. Suppression of the films as evidence would follow if the hearing court were to determine that the affidavits were unfaithful to the actual content of the films. In light of the safeguard procedure of *Franks* which the defendants clearly opted against utilizing, the Court of Appeals erred in affirming the suppression of the films.

The issuance and execution of the search warrant in the present case was reasonable under the First and Fourth Amendments. Sufficient safeguards existed to prevent unlawful pre-trial censorship and assure the good faith of the police who obtained the warrant from the magistrate.

The judgment of the Court of Appeals should be reversed by this Court.

POINT

THE SEIZURE OF VIDEO CASSETTE FILMS PURSUANT TO A SEARCH WARRANT SUPPORTED BY PROBABLE CAUSE WAS VALID UNDER THE FIRST AND FOURTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue in the present case regards the reasonableness of a seizure of video cassettes presumptively protected by the First Amendment but alleged to be obscene under New York State Penal Law Section 235.00. Because the probable cause determination of the issuing magistrate was based upon his evaluation of non-conclusory affidavits rather than upon a personal viewing of the cassettes sought to be seized, the question of reasonableness in this case has been focused on the adequacy of the affidavits. In affirming suppression of the seized cassettes, the New York Court of Appeals found the affidavits insufficient because they failed to contain adequate information to allow the magistrate to take a "hard look" at the materials and apply "the proper legal standards so that his subjective views or those of the police [did] not infringe upon the constitutional rights of citizens" (A8).

It is here argued that the Court of Appeals has misconstrued constitutional principles governing the application of the Fourth Amendment to seizures entailing First Amendment considerations. Firstly, the court incorrectly determined that a standard beyond probable cause was applicable to warrants authorizing the evidentiary seizure of allegedly obscene materials. Secondly, the court interpreted law pertinent to mass seizures of publications as controlling under the present facts despite that no mass seizure was undertaken by law enforcement officials.

Upon even the most cursory review of the opinion issued, the flawed legal analysis of the Court of Appeals is strikingly apparent. At odds not only with the pronouncements of this Court, but with the Constitution itself, the opinion confounds the legal principles applicable in cases involving seizures of presumptively protected materials and casts into flux significant aspects of First and Fourth Amendment law.

While paying lip service to the Fourth Amendment requirement that search warrants be supported by probable cause, the Court of Appeals majority soundly rejected the probable cause standard, ruling, in effect, that warrants authorizing the seizure of films and printed publications must be based upon *prima facie* proof that obscenity laws have been violated. Speaking as to the quantum of information necessary to support a search warrant, the majority stated:

> "There must be enough information before [the magistrate] in one form or another, however, to enable him *to judge the obscenity of the film*, not of isolated scenes from it. The affidavits, if that is all that is relied upon, need not describe the full content of the movie but they must contain enough information to permit the issuing magistrate, applying contemporary community standards, to judge the films as a whole and *determine that they are within the statutory definitions of obscenity and thus are not entitled to constitutional protection*" (emphasis added) (A8-A9).

The confusion wrought by the alteration of the legal standard of proof necessary to support a search warrant is demonstrated throughout the opinion with the court adding to the legal morass by failing to provide any guidance as to what exactly is required to satisfy the new and heightened standard.

The decision indicates that "a screenplay need not be annexed to a warrant application" (A7) yet faults the affidavits under review because they make no reference to the "narrative or dialogue of the films" (A6). The decision notes that affidavits in general need not describe the "full content of the movie" (A7) but rules insufficient the present affidavits though each of them purports to describe the "content and character" of each of the individual films named in the warrant (A48-A67). The majority further criticizes the affidavits for not demonstrating that the "predominant appeal" of the films was to prurient interest in sex (A6) while at the same time cautioning that the "subjective views" of the magistrate or police should not "infringe upon the constitutional rights of citizens" (A8). Lastly, the majority concludes that the procedures employed in the present case did not meet the "scrupulous exactitude" requirement pertinent to warrant seizures of published materials (A4), despite that the warrant authorized seizure of only specifically designated films, that only films designated were seized, and that the probable cause determination was made by a neutral and detached magistrate.

It is beyond dispute that a search warrant to be valid must be supported by information satisfying a "probable cause" standard (Fourth Amendment, United States Constitution). This Court, in defining the scope of the standard, has held that "the term 'probable cause' * * * means less than evidence which would justify condemnation" (*United States v. Ventresca*, 380 U.S. 102, 107) and that it requires only a "probability or substantial chance of criminal activity and not an actual showing of such activity" (*Illinois v. Gates*, 402 U.S. 213, 243 fn. 13). The common sense approach to be taken to the evaluation of probable cause is perhaps best described by the oft cited observation that:

> "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" *Brinegar v. United States*, 338 U.S. 160, 175.

As recently observed, "it is clear that 'only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause' " (*Illinois v. Gates*, 402 U.S. 213 at 235, citing *Spinelli v. United States*, 393 U.S. 410 at 419). In *Heller v. New York*, 413 U.S. 483, it was affirmed that this Court did not intend the applicable standard to be varied where obscenity or alleged obscenity is the target of a seizure conducted for evidentiary purposes. There it was commented with approval that the issuing judge "had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant" (*Heller, supra* at 488-9).

The Court of Appeals acceded to the propriety of using affidavits as the basis for a warrant to seize allegedly obscene material, specifically stating that an issuing magistrate need not "view the film or even a part of it before approving a warrant" (A7). Complaining, however, that the affidavits at issue did not "attempt to describe the film as a whole, the continuity of the action or the pervasiveness of the sexual conduct," (A6) the court held them legally insufficient to satisfy the appropriate warrant standard. While it is agreed by petitioner that a magistrate should be permitted to base a probable cause determination upon review of affidavits (see pp. 19-22 *infra*), it is contended that the affidavits herein, when reviewed under the guidelines established by this Court, establish to a standard of probable cause that the films sought for seizure were obscene under the three-pronged definition of New York Penal Law Section 235.00.

The affidavits, summarizing the "content and character" of each film, graphically catalogue the explicit and offensive sexual activity which the films depict. Acts of intercourse, anal intercourse, fellatio, cunnilingus, incest and onanism dominate the descriptions of the films reviewed. Indeed, the majority of the Court of Appeals characterized the sexual activity reported in the

affidavits as "patently offensive by *any* constitutional standard" (A6) (emphasis added).

That each affidavit compiled a miscellany of between eight and fifteen sexual acts, describable in a few words but manifestly consuming a substantial period of time, supports a finding that these activities represented the true character of each film. Buttressing such finding were the films' titles and the fact that in two of the films the affiant referred to the sexual acts as occurring "throughout." Of additional consequence was the fact that the films were advertised as "adult" films, a description commonly known to refer to materials with strong sexual content. A conclusion that the films' predominant appeal was to the prurient interest in sex comported fully with the information provided.

Beyond what the affidavits positively stated, they are equally significant for what they did not say. Not a sentence or phrase contained in any of the affidavits gave cause for even the weakest suspicion that the films' general appeal "might" be to something other than prurient sexual interest. Similarly the affidavits provided no basis for supposition that the materials contributed anything of value to art, literature, politics or science. As observed in *United States v. Middleton*, 599 F.2d 1349, 1359, where common sense dictates that episodes requiring several minutes to perform consume a substantial portion of the entire film, there is no basis for a concern that the scenes might "represent but a 'minute' part of the movie." This factor, as the *Middleton* court further observed, considered in conjunction with the patently offensive sexual activity also described as occurring in the movie, "satisfies parts (a) and (b) of the *Miller* test and effectively diminishes any reasonable expectation that the . . . scenes of explicit sex could be fragmented portions of a film which 'taken as a whole,' had serious literary, artistic, political or scientific value thus satisfying part (c)" of the *Miller* test. (*Cf.* New York Penal Law Section 235.00 subd. 1(a), (b) and (c)). Referring specifically to the affi-

davits in this case, the dissent in the Court of Appeals properly recognized that the magistrate could have reasonably concluded from the information available that "the described, successive acts of deviate sexual intercourse pervaded each film" and that no serious value could be discerned. As further noted by the dissent, any other reading of the affidavits "is to substitute [the Court of Appeals'] judgment for that of the magistrate and improperly engage in a hypertechnical and semantical review of the affidavits" (A18-A19).

This Court has repeatedly stated that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's determination of probable cause should be paid great deference by reviewing courts (*Gates, supra,* 402 U.S. at 231, *Spinelli, supra,* 393 U.S. at 419). To hypothesize, as does the Court of Appeals, that the affiant's statements may be interpreted not only as the magistrate has interpreted them, but also "in other, less inculpatory ways" (A7) and to act thereon by rejecting the validity of the magistrate's probable cause determination transgresses this basic tenet of judicial review. This is particularly the case where, as here, a less inculpatory interpretation of the affidavits could be formulated only by assuming the existence of information not supplied by the affiant. Interestingly, the Court of Appeals' finding that the cassettes *may* have contained material information not summarized by the affiant was never tested by a viewing of any of the cassettes at issue, nor did the defendant ever request such a viewing in any court.

Given that the issuing magistrate credited the police officer's assertions that the summaries truthfully described the "content and character" of the films and there being no justifiable basis to conclude that something of real significance had been omitted, the affidavits satisfied to a probable cause standard that the films in their entirety were obscene under the tripartite definition of

obscenity pronounced by this Court in *Miller v. California,* 413 U.S. 15, and adopted by the New York State Legislature in Penal Law Section 235.00. Accordingly, the warrant authorizing the evidentiary seizure of the video cassettes was based upon proof satisfying the clear standard imposed by the Fourth Amendment.

In essence, the Court of Appeals' condemnation of the warrant herein elevated the probable cause requirement of the Fourth Amendment to a mandate that a limited seizure for evidentiary purposes be based upon a pre-warrant determination of obscenity. As characterized by the dissent, the majority's holding represented a determination that "unless obscenity is unambiguously established by the affidavits in question, a magistrate is incapable of rendering a probable cause determination to issue a warrant for the seizure of sexually explicit films, described in those affidavits, solely for evidentiary purposes" (A9). In the language of the majority itself, the affidavits, if that is all that is relied upon, must allow the magistrate to "determine that [the films] are within the statutory definition of obscenity and thus are not entitled to constitutional protection" (A9).

In justifying this heightened standard, the court presented as controlling, decisional law appropriate to cases involving excessive and substantial restraint.

> "Because their seizure based upon the ideas they contain may constitute a prior restraint, there is a higher standard of evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs, for example (*Roaden v. Kentucky, supra,* 504; *Marcus v. Search Warrant,* 367 U.S. 717, 730-731). Thus, in applying the Fourth Amendment to such items, the court must act with 'scrupulous exactitude' " (*Stanford v. Texas,* 379 U.S. 476; see also, *Maryland v. Macon,* ____U.S.____, 53 U.S.L.W. 4783, 4784). (A4)

As a preliminary consideration, the court's reliance upon *Stanford v. Texas,* 379 U.S. 476, is misplaced. Examination of the circumstances of *Stanford* and the purpose behind the scrupulous exactitude mandate of this Court makes clear that no violation of this precept occurred in the instant case. In *Stanford,* the court explicitly reaffirmed its abhorrence of general warrants.

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." (*Stanford* at 485, citing *Marron v. United States,* 275 U.S. 192 at 196).

In particular the Court condemned the "indiscriminate sweep" of the language of the warrant which allowed officers to seize "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party in Texas" (*Stanford, supra* at 486). Noting that the resultant seizure of quantities of protected material "dramatically underscored" the "constitutional impossibility of leaving the protection of [First Amendment] freedoms to the whim of the officers charged with executing the warrant" (*Id.* at 485), the Court vacated the order below.

In the instant case, no such general seizure was possible under the warrant as issued. The cassettes sought were specifically named and, as evidenced by the warrant return, only the titles named were seized. Each film denominated in the warrant was particularly described by individual affidavit and the determination of probable obscenity for each was made by a neutral and detached magistrate. The requirement of scrupulous exactitude could reasonably demand no more.

It is, however, the court's application of doctrine relating to "prior restraint" which constitutes the most pronounced departure from this Court's decisions regarding the application of the Fourth Amendment to First Amendment situations. Without ac-

knowledgment of the distinction to be drawn between cases involving a significant restraint or clear censorship and those cases, like the present one, concerned with a strictly circumscribed seizure imposing no prior restraint, the Court of Appeals has imposed a requirement that obscenity be judicially determined prior to seizure. This position stands in direct conflict with both the approach to the question of reasonableness and the resultant standard for evaluation of the propriety of a warrant as determined by this Court.

As stated in *Roaden v. Kentucky,* 413 U.S. 496, 501 "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." Notably, the cases relied upon by the Court of Appeals as support for its imposition of a higher standard concern seizures determined by this Court to constitute extensive or prior restraints. In *Marcus v. Search Warrants of Property,* 367 U.S. 717, *A Quantity of Books v. State of Kansas,* 378 U.S. 205, *Lee Art Theatre v. Virginia,* 392 U.S. 636 and *Roaden, supra,* itself, all cases involving seizures from commercial establishments which were either selling written materials or showing films, it was determined that "the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition" (*Roaden, supra* at 504). Because the mass seizures, or as in *Roaden,* what was equivalent to a mass seizure, were "effected without any safeguards to protect legitimate expression" (*Marcus, supra* at 738), this Court found that they constituted an impermissible infringement upon the public's right of access to nonobscene material (*A Quantity of Books, supra* at 213).

The circumstances presented in *Heller v. New York, supra,* 413 U.S. 483, however, yielded a different result due to the different balance extant between the degree of restraint imposed by seizure and the safeguards in force to protect noncriminal expression. In *Heller,* this Court permitted the seizure of a film then being

shown at a movie house, without requiring a prior adversary hearing, based upon its determination that adequate safeguards existed to ensure compliance with First Amendment guarantees. First among these safeguards was the existence of a New York procedure which provided for a prompt post-seizure judicial determination of obscenity in an adversary proceeding at the request of any interested party. Conjoined with this provision was the fact that the judicial officer who issued the warrant was a "neutral and detached magistrate" who had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant and who was able to "focus searchingly on the question of obscenity." (*Heller, supra* at 488-489 citing *Marcus, supra* at 731-733) Finally the Court pointed to the apparent purpose of the seizure which was not to close down the movie house but was rather to preserve the film as evidence in a criminal prosecution (*Heller, supra* at 490).[1] Observing that the defendants failed to show that the seizure prevented exhibition of another copy of the film or that another copy was unavailable, and that they did not make a pretrial motion either for the return of the film or for its suppression, this Court refused to agree that even the temporary restraint imposed during the pendency of the adversarial determination of obscenity constituted "a form of censorship." (*Heller, supra* at 490)

The similarities between *Heller* and the case at bar are striking. Acting upon a warrant issued by a detached and neutral magistrate, police officers seized thirteen specifically designated cassettes for use as evidence in a criminal prosecution. No showing was ever made by the defendants that this seizure represented the entire stock of the store, nor does common sense permit such a conclusion. The defendants failed to allege that they were unable

[1] This Court has taken judicial notice of the fact that such films are compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film. *Heller, supra,* at 493.

to replace the seized cassettes with copies in order to continue distribution, and they declined to request that the lower court order that either copies or the originals be given to them pending an adversary determination of obscenity. Indeed, examination of the consequences of the instant seizure reveals significantly less restraint on the continued operation of the defendants' business and on public access to nonobscene materials than existed in *Heller* where, presumably, the seized film represented, at least at the time of seizure, the entire offering of the theater.

The primary distinction to be drawn between the instant case and *Heller* concerns the method by which the magistrate made the probable cause determination. In *Heller* he personally viewed the entire film authorized for seizure while in the case at bar, he relied upon the nonconclusory affidavits of a police officer affiant. The issue for this Court thus becomes whether reliance upon non-conclusory affidavits demonstrating probable cause is reasonable in circumstances constituting no prior restraint. It is submitted, in accord with the tenor of this Court's decisions, that non-conclusory affidavits which describe the tone of the film as a whole are adequate to allow the magistrate to focus searchingly on the question of obscenity in satisfaction of the constitutional requisites for evidentiary seizures.

Significantly in the case before the Court, the Court of Appeals found no quarrel with the use of affidavits *per se*. In addition, their complaint with respect to the affidavits at issue appears to have been related not to what was presented, which was sufficient without more to demonstrate probable cause, but rather with what might have been omitted, i.e. any indication of an appeal to other than prurient sexual interest or of a literary, artistic, political or scientific value. To the extent that an affiant intentionally or recklessly misrepresents the character of a film sought to be seized, this Court has, since *Heller,* provided an additional protection or safeguard. Under *Franks v. Delaware,* 438

U.S. 154, a defendant is entitled to a hearing upon a preliminary showing of material misrepresentation in a warrant application. Since the defendant would clearly be in the best position to know of such misrepresentation, the burden is properly on him to come forward with a specific allegation indicating the affiant's disregard of the true nature of the film seized. Where he does not, a reviewing court should not attempt to second guess the probable cause determination of the magistrate and theorize about a possible "less inculpatory interpretation" to be given the affidavits, as has the Court of Appeals below.

As recognized by this Court, the warrant clause upon which the probable cause standard for issuance of warrants is based "surely takes the affiant's good faith as its premise" *Franks, supra,* at 164). Where the affiant indicates, as he did in the instant case, that he viewed the entire film as the basis for his warrant application, the obvious conclusion to be reached is that he truthfully represented the essential nature of the film. In accord with the veracity requirement of an affidavit, an affiant's failure to make reference to an aspect of the film that would indicate a redeeming social value must, if unchallenged, be interpreted to mean that none exists. Given the safeguard provided by the procedure outlined in *Franks* and the fact that a seizure for evidentiary purposes even of presumptively protected First Amendment materials need be supported by no more than probable cause determined by a "neutral and detached" magistrate who has "focused searchingly on the question of obscenity," a seizure based upon proof by affidavit rather than personal viewing should be held to be constitutional.

That this procedure has already been ratified by other state and federal courts in addition to New York indicates not only that it is generally perceived to comport with constitutional mandates, but in addition, that it is of recognized practical value. Rejecting the argument that a magistrate need view a film before determin-

ing probable cause, the Supreme Court of Ohio in *State v. Burgun,* 384 N.E.2d 255, 261, asserted: "To make that procedure a *mandatory* prerequisite to the issuance of a warrant would place an undue burden on an already overladen criminal justice system" (emphasis in original). In the case at bar for example, a requirement that the magistrate personally view each cassette prior to deciding that each was, more probably than not, obscene would have dictated a judicial time commitment of approximately thirteen hours. Where the standard to be met is no more than probable cause and where there are extensive safeguards to protect against any meaningful restraint on either the defendant's or the public's First Amendment rights, such an imposition upon judicial resources is not justifiable.

Of the courts confronted with the question whether a sufficient affidavit is a constitutionally acceptable basis for issuing a warrant where obscenity is alleged, many have explicitly held that personal viewing is not required (*Sovereign News v. United States,* 690 F.2d 569, 6th Cir.; *United States v. Espinoza,* 641 F.2d 153, 4th Cir.; *People v. Foote,* 104 Ill. App. 3d 581; *Commonwealth v. Mascolo,* Mass. App., 375 N.E.2d 17, cert. denied 439 U.S. 899; *People v. Hobbs,* 59 Ill. App. 3d 793; *State v. Conaughty,* Okl. Cr., 561 P.2d 554; *Crecelius v. Commonwealth,* Ky., 502 S.W.2d 89). Other courts have approved the use of affidavits, agreeing with the court in *United States v. Sherpix,* 512 F.2d 1361, 1368, D.C. Cir. that "a proper affidavit can convey enough information to a Magistrate to enable him to make a determination of the alleged obscenity of the film sufficient to issue a warrant for its seizure" (*See United States v. Espinoza, supra; People v. Foote, supra; State v. Conaughty, supra; Crecelius v. Commonwealth, supra).* Where not expressly addressing the issue, courts have nonetheless failed to detect any constitutional infirmity with the exclusive use of affidavits and have upheld seizures when the affidavits were sufficient (*Sequoia v. McDonald,* 725 F.2d 1091, 7th Cir.; *United States v. Middleton,* 599 F.2d 1349, 5th

Cir.; *United States v. Bush,* 582 F.2d 1016, 5th Cir.; *United States v. Christian,* 549 F.2d 1369, 10th Cir.; *United States v. Marks,* 520 F.2d 913, 6th Cir.; *State v. Tavone,* 482 A.2d 693 (R.I. 1984), cert. denied ____U.S.____, 105 S.Ct. 1879; *Commonwealth v. Mascolo, supra; People v. Hobbs, supra; Dyke v. State,* 232 Ga. 817). The conclusion to be drawn from the numerous reported decisions is that the use of affidavits is a reasonable and appropriate procedure for the determination of probable cause in cases where obscenity is at issue.

In the instant case, despite the safeguards present, no allegation was put forth either to the effect that the cassettes were not in fact obscene or that the officer affiant had intentionally omitted a material element of the films that would have arguably removed them from the ambit of the obscenity statutes. Thus, it was at the very least precipitous for the New York courts to rule that the warrant in question was improperly issued.

It cannot fairly be said that the decision of the New York Court of Appeals rests upon legitimate and distinct state grounds. Where a state court decision "appears to rest primarily on federal law," and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so" (*Michigan v. Long,* 463 U.S. 1032, 1040-1041). Here the court below specifically relied upon its interpretation of *Marcus, Roaden* and *Stanford,* all seminal cases in the establishment of First Amendment protections, to reach its conclusion that a search warrant for video cassettes must be supported by a factual showing of more than probable cause. Of additional import is the fact that the state cases cited as support for the court's findings were themselves decided in reliance upon federal decisional principles (see *People v. Potwora,*

48 N.Y.2d 91, *People v. Abromovitz*, 31 N.Y.2d 160, *People v. Rothenberg*, 20 N.Y.2d 35).

While the court did make reference to the New York State Constitution as well as the United States Constitution to defend the general proposition that "no warrant shall issue except upon probable cause," such reference "in no way indicate[s] that the decision below rested on grounds *independent* from the state court's interpretation of federal law" (See *Long, supra* at 1042). As observed by the dissent, Penal Law Section 235.00 was adopted with the express purpose of incorporating into New York law the federal standard of obscenity set forth in *Miller, supra,* and indeed is identical thereto (A14). It is clear that to the extent that any non-federal ground is advanced by the case at bar, it is so interwoven with the federal ground raised as not to be an independent matter. Under these circumstances, the jurisdiction of this Court is plain (*Long, supra,* 1038, fn. 4 citing *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164).

The imprecise and legally inaccurate decision of the New York Court of Appeals stands as an impasse to the legitimate enforcement of New York's obscenity laws. In its misstatement of constitutional principles, the ruling serves only to engender unfounded pre-trial litigation in future obscenity actions further shifting judicial focus from the ultimate issue, i.e., the obscenity of the materials in question. Neither the interest of justice nor the orderly and expeditious administration of the criminal justice system supports an affirmance of the lower court's erroneous interpretation of those rights guaranteed by the Federal Constitution. In accord it is urged that this Court not let stand the judgment of the New York Court of Appeals in the present case.

CONCLUSION

THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(5)

No. 85-363

In The

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

vs.

P.J. VIDEO, INC., d/b/a NETWORK VIDEO, and JAMES ERHARDT,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On November 21, 1983, the Honorable Theodore S. Kasler, a Justice of the New York Supreme Court, issued a warrant autho-

rizing the seizure of ten video cassettes of adult movies.[1] The search and seizure was effected on November 22, 1983, when one or two copies of each of the specified films, with the exception of "California Valley Girls" and "Debbie Does Dallas", were seized.

Issuance of the warrant had been predicated upon the application of Detective Vance Scioli of the Village of Depew Police Department. Detective Scioli's application included the affidavits of David J. Groblewski, an investigator with the Erie County District Attorney's Office. Groblewski's affidavits explained that he had viewed a rental copy of each film in question. He then purported to describe various scenes from each film which allegedly included a variety of sexual activities.

Based upon his reading of these affidavits, and without any personal viewing of the films or excerpts or upon any questioning of the affiant police officers, Justice Kasler signed the warrant which resulted in the seizure of thirteen video cassettes and consequently, the filing of criminal charges of obscenity in the third degree (New York Penal Law Section 235.01) against Defendants P.J. Video, Inc., doing business as Network Video and James Erhardt.

In a motion to suppress use of the films as evidence, the Defendants argued that their seizure had been made in violation of Federal Constitutional Law and the Constitution and statutes of the State of New York. The Honorable Henry S. Wick, Justice of the Village Court of Depew, granted Defendants' motion, ruling that the warrant authorizing seizure of the cassettes had been issued on less than probable cause. According to Justice Wick, use

[1] "Deep Throat"; "Taboo II"; "California Valley Girls"; "All American Girls"; "Taboo"; "Little Girls Blue"; "Body Magic"; "Debbie Does Dallas"; "The Filthy Rich"; "Every Which Way She Can".

of the cassettes as evidence would be illegal because it was the investigating officer, rather than the issuing magistrate, who had, in effect, drawn the requisite inferences that there was probable cause to believe the materials obscene. (A38)

Justice Wick's determination was affirmed on appeal to the County Court of Erie County, which similarly held that the probable cause determination was inadequate because the magistrate had relied solely upon the affidavits of the police officer "without further investigation or viewing of the materials" (A33).

The determinations below were affirmed by the New York Court of Appeals which ruled, on July 5, 1985, that although a magistrate need not view a film prior to issuance of a warrant for its seizure, he must fashion some method which will enable him to focus searchingly on the question of obscenity. That necessary step was not met in this case where the magistrate neither viewed the films, secured sufficiently detailed and nonconclusory affidavits, or at the very least, questioned the officer who had viewed the film.

SUMMARY OF THE ARGUMENT

The Defendants seek affirmance of the decision of the New York Court of Appeals on the ground that it represents a correct and reasonable application of First and Fourth Amendment principles to the facts of the matter at bar. The affidavits which were submitted by the police officer in support of an application to search and seize presumptively protected material; to wit: adult films, were conclusory and incomplete, and contained only the enumeration of various sexual activities, allegedly occurring during the course of the films. Upon reviewing those affidavits, the Court of Appeals ruled that their submission, without any inquiry of the affiant by the magistrate, was not sufficient to enable that neutral and detached personage to focus searchingly on the question of obscenity.

In propounding the correctness of the decision, the Defendants refute the claims of the District Attorney of Erie County that the Court of Appeals rejected the probable cause standard in favor of a requirement that a search warrant application contain *prima facie* proof of obscenity. The Court's ruling that a magistrate issuing a search warrant for seizure of the allegedly obscene must consider the tripartite definition of obscenity does not mean that the Court either explicitly or implicitly opted for that level of proof required at trial. Likewise, the Court's ruling that the magistrate's receipt and review of affidavits listing an assortment of sexual acts did not constitute the focused inquiry on obscenity which is demanded under the rubric of the First Amendment does not mean that the Court of Appeals veered from the precedent established by this Court.

The Defendants also argue that the mandate to exercise the utmost caution and finesse in separating the obscene from the non-obscene is as applicable to a situation where thirteen video cassettes are seized as one where the purloined materials number in the hundreds or thousands. In positing this aspect of the argument, Defendants merely rely on the precedent that the seizure of expressive material calls for more rigorous procedural protections than the seizure of drugs, weapons or the like. The District Attorney's request of this Court to deny those protections when great masses of materials are not involved is neither logical nor just and invokes an earlier age of repression and censorship which should be firmly excised from the pages of this country's history.

POINT

THE NEW YORK COURT OF APPEALS DID NOT MISAPPLY FIRST AND FOURTH AMENDMENT PRINCIPLES ESTABLISHED BY THIS COURT AND THE SEIZURE OF VIDEO CASSETTE FILMS WAS NOT BASED UPON PROBABLE CAUSE OF OBSCENITY

Petitioner, the District Attorney of Erie County, is incorrect in his assertion that the New York Court of Appeals determined that a standard beyond probable cause was applicable to warrants authorizing the seizure of the allegedly obscene. The Court correctly applied the appropriate probable cause standard, guided by this Court's rulings in cases such as *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 (1973) and its own judicial determinations under Article I, Section 8 of the New York State Constitution. In maintaining otherwise, Petitioner essays a narrowing of this Court's First Amendment rulings under the guise of explication of proper constitutional principles. The Defendants sincerely abjure the attempt to encroach upon the perimeters of free speech and respectfully ask the Court to reject it in total.

The analytical starting point of the Court of Appeals' consideration was its recognition that "the task of the issuing Magistrate in this case was not to decide guilt or innocence but to determine in a preliminary way from the information submitted and available to him whether there was probable cause to believe that the material to be seized was obscene within the tripartite definition of the statute" (A5). That statute referred to, New York Penal Law § 235.00, provides the state's definition of obscenity which, in turn, incorporates the threefold criteria of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973).

Bypassing the Court's explicit recognition that the magistrate is not to determine guilt or innocence but rather, whether there is a probability of obscenity, the District Attorney seeks to persuade that the challenged holding is predicated on the misapprehension that the warrant application must contain *prima facie* proof of obscenity. That the Court championed that improper standard, Petitioner continues, can be gleaned from its statement that a magistrate must have enough information in front of him to judge the *obscenity* of the film, not of isolated scenes from it.

Quite clearly, the import of the Court's sentence was its explication that the magistrate's task involved an evaluation of the *entire* material in question, not merely its parts. That it referred to the obscenity of the work, as opposed to probable obscenity, is, linguistically as well as constitutionally, an insecure basis for its conclusion that the analysis of the Court of Appeals was flawed and that it "casts into flux significant aspects of First and Fourth Amendment law" (page 11 of Petitioner's brief). Evidently, the People would likewise fault this Court for its statement in *Marcus v. Search Warrants of Property*, 367 U.S. 717, 81 S.Ct. 1708 (1961) that prior to seizure of presumptively protected materials there must be the opportunity to focus searchingly on the question of *obscenity*. That the Court did not speak of probable obscenity does not indicate that it intended to disregard the probable cause test any more than the Court of Appeals' language evidences a willingness to flout that standard.

The Defendants recognize that probable cause needs less evidence than is necessary to sustain a conviction and that it requires only a probability or substantial chance of criminal activity (*Illinois v. Gates*, 462 U.S. 213, 243, fn. 13, 103 S.Ct. 2317, 2335

[1983]).[2] However, in this case, the criminal activity alleged is obscenity and, of necessity, the determination of probable cause to believe the suspect material obscene requires consideration of the tripartite test of *Miller v. California, supra*, as adopted by New York's Penal Law.[3]

Equally significant, and given due regard in the decision of the Court of Appeals, is the fact that the unhampered exchange of ideas also depends on adherence to the Fourth Amendment's prohibition against unreasonable searches and seizures. In order to effectuate that mandate, as applied to the First Amendment, this Court has structured protections which necessitate a "step in the procedure designed to focus searchingly on the question of obscenity" (*Marcus v. Search Warrants, supra* at 732, 81 S.Ct. at 1716). The Court has ruled that a magistrate must conduct that inquiry and accordingly, must take a truly active role in the probable cause process, foregoing any sort of passive reliance on conclusory allegations of the police (*Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 [1973], *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103 [1968]).

Because the definition of obscenity is a complicated one, a probable cause analysis, encompassing consideration of the work as a whole and whether it might have serious value, likewise entails consideration of multiple factors. The search for a definition

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[2] The New York Court of Appeals has chosen not to follow the *Gates* rationale in matters of search and seizure based upon its interpretation of the pertinent provisions of the State Constitution. *People v. Bigelow*, ____N.Y.2d____, November 26, 1985.

[3] That test requires the magistrate to consider:
(a) whether the average person, applying contemporary 'community standards' would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value (*Miller v. California, supra* at 24, 93 S.Ct. 2615).

of obscenity did not begin with *Miller v. California*. That case was but the culmination of the labors of this Court and others which sought, if not to solve, then at least to illumine the "intractable problem of obscenity." The cause for the years of consternation is, as expressed by Justice Brennan, the fact that the Constitution provides no guidelines for discernment of the obscene:

> "The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others" (*Miller v. California, supra*, Brennan, J. dissenting, 413 U.S. 40-41, 93 S.Ct. 2624).

It is because the quest to separate the obscene from the non-obscene is so difficult and delicate an operation, if one is to heed the principles of free speech, that the probable cause determination is also a serious and complicated undertaking which must not be left to the police officer. Recognition of that fact and a concomitant effort to ensure that the magistrate considers the whole and has sufficiently detailed abstracts before him or, ideally, the movie itself, does not mean that the Court of Appeals has cast the concept of probable cause into flux. It has but followed the precept that the allegedly oscene cannot be treated like contraband drugs or weapons (*Roaden v. Kentucky, supra* at 502, 93 S.Ct. at 2800 [1973]). Free speech, to this country's credit and its distinction, demands more, and if that is somewhat inconvenient to us all, this Court, as representative of the people at large, has realized that it is a small price to pay for our ability to speak out without fear of repression. Clearly, the standards applied in this case relate not just to the seizure of sexually oriented matters but to the potential seizure of all written or pictorial representations.

The sufficiency of the underlying affidavits lies at the crux of this case and they must be examined as the concrete indicators of

the opinion of the Court of Appeals. There are ten (10) affidavits relating to as many films[4] rented from the Respondents' stores.

As found by the Court of Appeals, the investigating officer took between eighty to ninety minutes to view each film and then authored an affidavit allegedly describing the sexual acts depicted in some of the scenes. The Court further noted that the average affidavit contained between fifteen to twenty lines, the two shortest affidavits having eleven lines and the longest, twenty-seven lines. Expressing its dissatisfaction with the affidavits themselves as an adequate foundation for a finding of probable cause, the Court said:

> "Thus, some of the affidavits describe only two or three scenes in the movie and others refer to 'one scene', 'a scene', 'another scene', or a 'later scene' without any attempt to describe the film as a whole, the continuity of the action or the pervasiveness of the sexual conduct. The descriptions of the action are not supplemented by references to the narrative or dialogue of the films and the affiant attempted to describe the 'character' or 'theme' of the movies by settings having nothing to do with plot, phrases such as 'a middle-class white neighborhood', 'the home of one of the six girls', or 'a high school for girls.' He made no attempt to reveal the story line (or lack of one) of the films or demonstrate that their 'predominant appeal' was to prurient interest. In short, none of the affidavits permit an inference that the scenes described are more than a catalog of the offensive parts of the whole" (A6).

It needs only to re-examine some of the affidavits in question to discern the basis for the Court's dismay. For instance, the review of "California Valley Girls" notes that the movie concerns six white females who attempt to make a living by becoming prosti-

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[4] "Deep Throat"; "Taboo II"; "California Valley Girls"; "All American Girls"; "Taboo"; "Little Girls Blue"; "Body Magic"; "Debbie Does Dallas"; "The Filthy Rich"; "Every Which Way She Can".

tutes. Five scenes are described, the first categorized as a bedroom scene where "two females are involved in love-making, fondling and cunnilingus". The second scene depicts a white male and a white female having "intercourse in the back of a van" (A52).

The description of these two scenes typifies the inadequacy of the affidavits as a body. Sex and obscenity are not synonymous (*Roth v. United States*, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310 [1957]) and there is nothing necessarily obscene about the explicit depiction of love-making, fondling or the act of intercourse said to have occurred in the back of a van.

Moreover, even when considered in conjunction with the remaining three episodes of "California Valley Girls" which are discussed, the affidavit does not indicate whether these five scenes constituted the sum of the movie. A work which is not considered as a whole cannot be judged even probably obscene. Nor, based upon the affidavits included in this case, could an issuing magistrate properly assess whether the movie has some genuinely serious artistic, literary, political or scientific value. While the officer himself cannot offer his subjective assessment of serious worth, he must afford the magistrate enough information to enable him to do so. The affiant might state that the film includes the sexual acts described and nothing more or conversely, that the film, while detailing explicit sexual acts, is in documentary form or contains a substantial narrative. The ambiguous assertion, inserted as a prelude to each affidavit, that the affiant is describing the "character and content" of the movie is not sufficient to ensure that the whole has been adequately represented (A48 - A67).

This Court is cognizant that the police officer in the field is engaged in the often competitive task of uncovering crime. He looks for violations of the law because his is the job of law enforcement. He cannot be expected to exercise the calm objectivity of the magistrate. The officer on the street cannot be faulted for reacting to

only parts of a film or to explicit acts of sexuality, the representations of which, nonetheless, have serious literary or artistic value. Indeed, it is to avoid possible police excesses, real or imagined, that the magistrate's function is to interpose himself between citizenry and police:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime", *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512 (1964), citing *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369 (1948).

That call to neutrality and quiet detachment is all the more to be preserved when the inferences to be drawn affect our freedom of expression.

The scenario which sees the police officer as presenting for review the more lurid or objectionable parts of a film which may ultimately be deemed non-obscene is extremely likely in a day when the limits of customary candor are not readily exceeded. Several of the same cassettes at issue here[5] were held to be non-obscene in *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983). The Court viewed the films and read the magazines in question and determined that although they "unquestionably are examples of hardcore pornography, describing and depicting a wide range of scenes of explicit sex . . . including detailed portrayals of genitalia, sexual intercourse, fellatio and masturbation" (*Id.* at 134), they did not offend the average member of the community and were, therefore, not obscene.

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[5] Namely, "Deep Throat", "Debbie Does Dallas", "Little Girl Blue".

While the Petitioner avers that nothing in the affidavits gives cause for even the suspicion that the films appeal to something other than prurience, that conclusion can be made much too complacently in the obscenity arena. Law enforcement officials are not alone in the ready assumption that depictions of tawdry sex and concupiscence equate with obscenity. Indeed, it is not so long ago that books now recognized as having serious and substantial literary merit were branded as obscene by the judiciary. Of *The Tropic of Cancer and The Tropic of Capricorn*, the Ninth Circuit Court of Appeals said:

> "Consistent with the general tenure of the books, even human excrement is dwelt upon in the dirtiest words available. The author conducts the reader through sex orgies and perversions of the sex organs and always in the debased language of the bawdy house . . . It is claimed that they [the novels] truthfully describe a base status of society in the language of its own iniquities. And that, since we live in an age of realism, obscene language depicting obscenity in action ceases to be obscenity", *Besig v. United States*, 208 F.2d 142, 145 (9th Cir. 1953).

It is not always easy to discern probable obscenity. And, while the magistrate is not necessarily more competent at isolating the obscene, our system of laws has invested that individual with the power and responsibility of doing so. Because he is the buffer between the people and the police it is his task to make the probable cause determination by viewing the film or questioning the affiant; to take some action more probing than accepting without any inquiry, focused or otherwise, a five sentence affidavit submitted by an affiant engaged in the competitive field of police work.

Although the District Attorney argues that the question of obscenity is to be resolved at trial, the magistrate's probable cause determination, his focused inquiry, must necessarily contain an assessment of community standards and the worth of the work as

a whole; in other words, all three aspects of the *Miller v. California* configuration. If the probable cause determination does not take these factors into account, then previous of this Court's holdings, ruling that a police officer cannot, as a matter of law, find probable cause of obscenity, would be senseless.

In *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103 (1968) the warrant issued on the strength of the officer's affidavit giving the titles of the films and his conclusion, based on his personal viewing of them, that they were obscene. The Court found that the method employed did not afford the magistrate an opportunity to focus searchingly on the question of obscenity and that it was not duly sensitive to the needs of the First Amendment (*Id.* at 637, 88 S.Ct. 2104).

In *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 (1973) the Court held that the arresting police officer cannot make a determination of probable obscenity. The seizure was deemed illegal since it proceeded solely on the officer's conclusion that the film was obscene: "Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity'" (*Id.* at 506, 93 S.Ct. 2802).

These cases explicitly reiterate and re-emphasize the primary teaching of *Marcus* that the procedure employed must allow the magistrate to focus searchingly before the probable cause decision is rendered. This Court has never implied that a simple catalog of sexual acts will suffice as the functional equivalent of a proper finding of probable obscenity. Even if the police affidavits enumerate detailed and graphic sex, they are not a valid substitute for the magistrate's active inquiry, his probing analysis of whatever else those films may or may not contain or represent. Thus, the New York Court of Appeals reasonably decided that, in this case, the officer's list of sex acts did not pass muster, absent some affirmative step on the part of the magistrate; this perhaps as simple as a few pointed questions of the affiant designed to determine

whether the material as a whole was correctly portrayed. On this basis, the Court declared the affidavits insufficient given their lack of reference to dialogue, narrative or music as elements of the films which might reveal their essence and assist a focused inquiry.

Rather than give any credence to the New York Court's insistence upon these cornerstones of First Amendment law, the District Attorney would prefer to bypass the constitutional requirements altogether and to engraft his own notions of due procedure onto the precedent painstakingly devised by this Court. Accordingly, the District Attorney has decided that the law of prior restraint should apply only to cases where massive amounts of presumptively protected materials have been seized, that this Court's previous First Amendment rulings are only "appropriate to cases involving excessive and substantial restraint" (Petitioner's brief, page 16). Because, according to the District Attorney, only specifically named cassettes were seized for use as evidence in a criminal prosecution, there was no mass seizure, thereby rendering cases such as *Marcus v. Search Warrants, supra, A Quantity of Books v. State of Kansas*, 378 U.S. 205, 84 S.Ct. 1723 (1964), *Roaden v. Kentucky, supra*, and *Lee Art Theatre, Inc. v. Virginia, supra*, superfluous.

The argument is both analytically devoid of worth and factually incorrect. Although only the specific titles in the warrant were seized, the police obtained more than one cassette of each movie (A71, A72). And, before the search warrant was ever issued or executed, the police had rented copies of all the movies in question, which copies were used for viewing (A48 - A67). Nonetheless, despite Defendants' complaint below, the District Attorney has never explained why these rental copies could not have been used for evidence in the criminal prosecution or why it was necessary for his office to secure two additional copies of five of the ten

films[6] (A71, A72) and an additional copy of the remainder of the films.

Furthermore, and even more crucial to the constitutional issues at play, this case does involve a prior restraint and massive seizure. At oral argument in the trial court, Defendants stated unequivocally that the police had seized the only remaining copies of the cassettes (R114). In response, the Assistant District Attorney admitted that he did not know if the supply of these particular films had been exhausted by the seizure (R114). In his brief to this Court, the District Attorney sidesteps the issue and maintains only that the Defendants have made no showing that the seized items constituted the entire stock of the store or that the particular cassettes could not be reordered.

Petitioner's cavalier assertions notwithstanding, the repressive effect of a seizure does not necessarily depend on how many items are taken. In *Roaden v. Kentucky, supra*, the Court acknowledged that seizure of one film can work as egregious a restraint upon free expression as seizure of hundreds of copies of a book or magazine (*Roaden, supra*, at 505, 93 S.Ct. at 2801). Nor will it suffice to assert that a distributor can replace the copies or ask that a copy of the offending film be made prior to the obscenity determination. The precedent of this Court has never suggested that a rigorous probable cause determination could be glossed over if other copies of the sought materials could be secured, (thus permitting one free police seizure without regard to constitutional restraints).

While the Court, in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789 (1973) has said that copying is a reasonable way to ensure that a film remains accessible to the public, it has never indicated that copying can fulfill the requirements of the Constitution and

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[6] "Taboo", "Taboo II", "All American Girls", "Little Girls Blue", and "Deep Throat".

here, state procedural statutues, assuaging the complaints of those whose materials are seized under the guise of probable cause. In *Heller*, copying was permitted only after the seizure was made pursuant to a warrant issued after a neutral magistrate had made a probable cause finding, a process which was followed by a prompt final determination of obscenity in an adversary hearing. The Court said: "With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection" (*Id.* at 493, 93 S.Ct. 2795, emphasis in original). It is thus manifest that the ability to copy a film or order others does not excuse the constitutional requirement to focus searchingly before material presumptively protected by the First Amendment is secured. Nor should the Defendants shoulder the burden of seeking a hearing under the rule of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) which is to be employed only in those limited and well-defined circumstances where there are allegations accompanied by an offer of proof, of "deliberate falsehood or of reckless disregard for the truth" (*Id.* at 171, 98 S.Ct. 2684). The Constitution does not permit counterfeit alternatives, particularly in the free speech arena.

Nonetheless, the District Attorney makes the further point that even were replacement copies unavailable, the law of prior restraint is not to be considered in this case since the seizure involved only thirteen cassettes, not the massive amounts of material taken in *Marcus v. Search Warrants*, *supra* and *A Quantity of Books v. Kansas*, *supra*. While it is true that those cases involved vast numbers of books and magazines, the principles of law which emerged from their injudicious seizure are equally applicable to cases such as that under consideration.

In *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 (1973) the Court explained that the seizure of one film being distributed to the public is as much a prior restraint as the seizure of all the books in a book store (*Id.* at 504, 93 S.Ct. 2801). Likewise, in this

case, the seizure of all copies of the named titles divested the public of its chosen viewing matter just as would the seizure of all copies of a book in print. In any case, the District Attorney's argument that reliance on affidavits of questionable worth is permissible if only a *few* items are seized, suggests a dangerous precedent and recalls this Court's reminder that freedoms of expression "are vulnerable to gravely damaging yet barely visible encroachments". *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963).

Where free speech is at stake then the most exacting safeguards must be employed before that which is presumptively expressive will be restrained. The mandate that courts exercise a "scrupulous exactitude" (*Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511 (1965) to guarantee that the power to search and seize does no damage to freedom of expression cannot be proportionally diluted by reference to the numbers of materials to be garnered. Rather, the spirit of cases such as *Marcus* and *A Quantity of Books* and those cases decided subsequently invests all like situations and demands that any seizure of presumptively protected materials, even if they be but a few titles of a trashy novel, be preceded by a *procedure* designed to focus searchingly on the question of obscenity. Presumptively protected material cannot be treated, for Fourth Amendment purposes, like forms of contraband, no matter how few the volumes or inconsequential the type of speech. To posit otherwise would pave the way for the damnable specter of censorship of the unpopular, the questionable, the controversial and the tasteless.

Speech in the marketplace of ideas is a heritage simply too precious to permit of tampering. It has long been recognized that there is a fine line which divides legitimate speech from that which may properly be regulated and thus, that the delineation of that line calls for the employment of sensitive tools (*Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342). The District Attor-

ney's attempt to obscure that line by dwelling upon the quantity of materials is to be resisted as unnecessarily and illogically eroding the foundations of free speech.

In his dissent in *Maryland v Macon*, ____U.S.____, 105 S.Ct. 2778 (1985), Justice Brennan articulated the reason that the Court has been so zealous in its protection of the spoken or printed word, why it has fashioned such rigorous constitutional safeguards to accompany regulation of the presumptively protected:

> "These strict requirements reflect a judgment that the inherently difficult decision respecting whether particular material is obscene can under no circumstances properly be left to investigating authorities, 'engaged in the often competitive enterprise of ferreting out crime', *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed.2d. 436 (1948). The difficulty of applying the arcane standards governing obscenity determinations exacerbates the risk of overzealous use of the power to search and seize" (*Id.* at ____U.S.____, 105 S.Ct. 2784).

These words capture the defendants' argument. Obscenity is not protected speech but the difficulty of segregating it from protected expression, at the probable cause stage, as well as at trial, demands that a focused and searching inquiry occur. That inquiry is not, as Petitioner insists, equivalent to a determination of guilt or innocence. Rather, it is an inquiry, the relative complexity of which reflects this nation's desire to preserve ideas. The inquiry cannot be conducted by the police, no matter how faithful they be to the tenets of the law or the rigors of procedure. It is the magistrate who has been assigned the task of winnowing the obscene from the non-obscene, even at the preliminary stage, and in order to perform that function effectively and fully, he must have all necessary facts before him. Whether he sees the movie or questions the affiant police officer, his determination cannot properly be made on the basis of incomplete and conclusory assertions of obscenity alone. Recognizing those fundamentals of First and

Fourth Amendment law, the New York Court of Appeals affirmed the unanimous holdings of the lower courts that the procedure involved, devoid as it was of any affirmative step by the magistrate to clarify the ambiguous, incomplete and conclusory affidavits, did not partake of a focused search which sufficiently laid the groundwork for a finding of probable cause. That ruling should be upheld and enforced by the nation's High Court.

CONCLUSION

The Judgment of the New York State Court of Appeals should be affirmed.

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REPLY

BRIEF

No. 85-363

In The

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

vs.

P. J. VIDEO, INC., d/b/a Network Video and James Erhardt,

Respondents.

ON WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The New York Court of Appeals has erroneously elevated the standard of proof applicable to evidentiary seizures of presumptively protected materials.

Respondents assert that the Fourth Amendment probable cause standard was not rejected by the Court of Appeals in the present case, indicating that the court's opinion provides no basis for the conclusion that the burden on law enforcement officials has been elevated. The fallacy of this position is demon-

strated both by examination of the clear language of the majority opinion and by dissection of the analysis employed in finding the seizure to be unconstitutional.

First it bears reiteration that the court below specifically stated that prior to issuance of a warrant a magistrate must be able to "judge the obscenity of the film[s]," to "determine that they are within the statutory definitions of obscenity," and to find that they "are not entitled to constitutional protection" (A8-A9). The elevation of the traditional probable cause standard which these statements represent was cogently characterized by the dissent as follows:

> "The majority today holds, that unless obscenity is unambiguously established by the affidavits in question, a magistrate is incapable of rendering a probable cause determination to issue a warrant for the seizure of sexually explicit films, described in those affidavits, solely for evidentiary purposes. This adopted position has never been advanced by the United States Supreme Court, and has been rejected unanimously by the federal courts and by an overwhelming number of the sister state courts that have considered it" (A9-A10).

Notably, the majority responded not to deny but rather to confirm said interpretation. Referring specifically to the above cited passage, the court in footnote 3 of its opinion stated:

> "The dissent contends that this standard has been 'rejected unanimously by the federal courts and by an overwhelming number of sister state courts that have considered it' (dissenting opn., p 2). It fails, however to cite any authority to support this sweeping generalization" (A7).

The dissent took at least two additional opportunities to point out to the majority the difficulties posed by the standard pronounced in this case. It reviewed the reasoning of the federal court in *United States v. Pryba,* 502 F.2d 391, wherein the court noted that in an obscenity case, "the term 'probable cause' ...

means less than evidence which would justify condemnation" (A20), and commented that:

> "The D.C. Circuit clearly illustrates the proper role of a reviewing court in adjudging a magistrate's probable cause determination, and rejects the notion, adopted today by the majority in this court, that the supporting affidavit must unambiguously establish obscenity in order to demonstrate a probability that the film is obscene under the *Miller* test" (A20).

The dissent further directed the majority's attention to the federal court holding in *Sequoia Books, Inc. v. McDonald,* 725 F.2d 1091, 1093-1094, wherein a unanimous court found that, "the slight possibility of a temporary suppression of constitutionally protected sex magazines is not enough to invalidate the warrant under the Fourth Amendment" (A21). As noted by the dissent, "*Sequoia Books,* like *Pryba,* demonstrates the needlessness and irrelevance of the majority's requirement for mathematical specificity in warrant affidavits submitted at the probable cause stage of an obscenity prosecution" (A21).

Having acceded in footnote 3 to the validity of the dissent's evaluation of its holding, the majority chose to sidestep the issue raised by the dissent concerning the standard of probable cause as enunciated by *Pryba* and *Sequoia Books* and instead rejected the holdings of those cases upon their facts (A8, footnote 4). Again, however, the majority did not deny the accuracy of the dissent's complaint that what was being required by the court was "that the supporting affidavit must unambiguously establish obscenity in order to demonstrate a probability that the film is obscene under the *Miller* test" (A20).

Perhaps more important than the explicit language used by the court to describe warrant requirements is the reasoning employed which confirms that the majority intended application of a greater than probable cause standard. The majority committed two crucial analytical errors in its attempt to follow this Court's

precept that, "there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs for example (*Roaden v. Kentucky, supra,* 504; *Marcus v. Search Warrant,* 367 U.S. 717, 730-731)" (A4).

First, the court confused the procedural safeguards mandated by the First Amendment in a seizure context with the Fourth Amendment standard of probable cause. As summarized by the dissent in *Maryland v. Macon,* ____U.S.____, 105 S.Ct. 2778, 2784, these procedural safeguards encompass the following requirements:

> "An official seizure of presumptively protected books, magazines, or films is not 'reasonable' within the meaning of the Fourth Amendment unless a neutral and detached magistrate has issued a warrant particularly describing the things to be seized, *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 99 S.Ct. 2319; *Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, and the probable-cause determination supporting the warrant is based on a proceeding in which the magistrate has the opportunity to 'focus searchingly on the question of obscenity,' *Marcus v. Search Warrant,* 367 U.S. 717, 732, 81 S.Ct. 1708, 1716; see also *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796; *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789; *Lee Art Theatre v. Virginia,* 392 U.S. 636, 88 S.Ct. 2103."

In the case at bar, neither the court nor the defendant disputed the neutrality of the magistrate, nor was his focused attention to the warrant application challenged. In addition the majority did not find that undesignated films were or could have been seized. Indeed the specificity with which the warrant in this case was drafted and the limited scope of the seizure authorized evinced a clear compliance with the mandate that "the court must act with 'scrupulous exactitude' " in applying the Fourth Amendment to items such as books and films (*Stanford v. State of Texas,* 379 U.S. 476).

The Court of Appeals' incongruous attempt to apply the term "scrupulous exactitude" to the concept of probable cause which, as its very name announces, cannot be exact, illustrates the confusion with which the court approached this issue. Having ignored the fact that the specialized protections accorded materials presumptively protected by the First Amendment had been satisfied, the court attempted to meet the "higher standard" mandates of *Roaden* by requiring that the affidavits demonstrate obscenity rather than probable obscenity.

The second critical flaw in the majority's reasoning concerned its reliance upon this Court's decisions relative to prior restraint or mass seizure despite the fact that the case at bar involves neither. The Court of Appeals majority failed to address the manifest objective of the seizure at issue, i.e. preservation of a limited number of films for evidentiary purposes, and indicated without further reasoning that a higher standard of evaluating the warrant was appropriate due to the danger of prior restraint (A14). Inasmuch as the seizure at issue entailed no disruption of the orderly and presumptively legitimate distribution engaged in by the defendant nor did it even restrain the defendant from continued sale or rental of other copies of the specific films seized, reliance upon a standard suitable to mass seizures or prior restraints was unwarranted.

This Court's determination that probable cause alone is not sufficient to justify a mass seizure for purposes of destruction has not been found to apply to situations involving seizures for evidentiary purposes, particularly where additional safeguards exist to protect both the defendant's and the public's interest in the continued distribution of materials protected by the First Amendment (*Heller v. New York,* 413 U.S. 483, 491-2). However, the connection forged by the Court of Appeals between the case at bar and the mass seizure or prior restraint cases provides further proof that the majority below fully intended the probable

cause standard to be elevated in all cases involving the seizure of allegedly obscene works.

II

The Respondents have failed to demonstrate that the seizure herein constituted a substantial restraint.

Although the Court of Appeals did not conclude that execution of the warrant at issue resulted in a mass seizure, the respondents take the position that such was indeed the case. Glossing over the fact that only thirteeen cassettes of eight titled films were taken, the respondents assert that the case involved both a prior restraint and a massive seizure and criticize petitioner's suggestion that more than a bare allegation is necessary to support such a claim (Brief for Respondents, 15).

This Court in *Heller,* 413 U.S. 483, clearly indicated that the burden of showing that a seizure has operated to prevent future sale or distribution rests with the defendant. As noted by the Court:

> "In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence*. There has been no showing that the seizure of a copy of the film precluded its continued exhibition." *Heller, supra* at 490.

Emphasizing the distinction between a seizure for purposes of destruction and one for evidentiary purposes, this Court further observed:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where,

> as here, *there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film.*" (emphasis added) (*Heller, supra*).

Logic compels that the burden to demonstrate mass seizure or substantial restraint properly rests upon respondents. Only they could have known the extent to which the seizure herein impaired continued dissemination of the subject materials.

Examination of the record in the instant case reveals that during the entire pendency of these proceedings, the respondents never requested copies of the seized films, nor did they ever indicate to the court that they were unable to continue the operation of their business without the return of the films. Further, no demonstration was made that the manufacturers of such films could not have provided additional prints. The failure to make such a showing vitiates respondents' attempt to assert that they suffered from either a mass seizure or a prior restraint.

III

Respondents properly bear the burden of making a preliminary showing that the affiant intentionally, knowingly or recklessly disregarded the truth in describing the character and content of the films sought to be seized.

The respondents similarly contend that they should not be required to "shoulder the burden of seeking a hearing under the rule of *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674 (1978)" (Brief for Respondents, 16). It is worthy of note that a focus of the respondents' argument and of the Court of Appeals' decision below was the concern that the affiant may have materially misrepresented the nature of the films at issue by omitting information relative to a possible literary, artistic, political or scientific value. Such misrepresentation with respect to a material element of the film would, at a minimum, qualify as a reckless disregard for the truth, particularly in view of the affiant's contention that

he was conveying the "content and character" of each of the targeted films. Under these circumstances a *Franks* hearing is an appropriate safeguard for the respondents who, as purveyors of the seized films, would be in the best position to support the allegation that the affidavits were materially inaccurate.

An additional consideration with respect to the question of who should bear the burden of seeking a *Franks* hearing concerns the preference to be accorded searches conducted under the authority of a warrant. In line, this Court has determined that affidavits submitted in support of search warrants are presumptively valid (*Franks, supra,* at 171). Given this presumptive validity, the burden of challenging the integrity of a warrant affidavit properly rests with the defendant. Indeed the preference for warrants is such that a hearing with respect to the integrity of an affidavit is permitted only upon a "suitable preliminary proffer of material falsity" (*Franks, supra,* at 169). The respondents' conclusory reference to such procedure as a "counterfeit alternative" not permitted by the Constitution (Brief for Respondents, 16) thus stands in contrast to the holding of this Court.

CONCLUSION

THE JUDGMENT OF THE NEW YORK COURT OF APPEALS SHOULD BE REVERSED.

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AMICUS CURIAE

BRIEF

No. 85-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

P.J. VIDEO, INC.
d/b/a NETWORK VIDEO
and JAMES ERHARDT,

Respondents.

On Writ of Certiorari to the New York Court of Appeals

BRIEF FOR VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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FEDERAL QUESTION PRESENTED

Amicus curiae submits that the federal question in this case is whether issuance of a warrant authorizing the seizure of a filmed work on an allegation of obscenity is prohibited under the Constitution of the United States when the only information about the film's content before the judicial officer who issued the warrant is an affidavit that merely recounts various sexual acts performed during the course of the film by the characters portrayed in the film.[1]

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[1] *Amicus curiae* urges that this federal question should be answered in the affirmative and therefore disposes of the case. Should the Court conclude, however, that federal constitutional requirements were fulfilled in the issuance of the warrant in this case, *amicus curiae* believes that a remand of the case to the New York Court of Appeals for a ruling on the application of state constitutional provisions is necessary. *See Massachusetts v. Upton*, 466 U.S. 727 (1984).

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BRIEF FOR VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus curiae Video Software Dealers Association ("VSDA") is a national trade association the members

of which are in the business of selling and renting video software—generally in the form of cassettes—for replay and viewing in the home. Its regular membership consists of approximately 2,000 retailers and wholesalers throughout the United States, representing over 10,000 retail video stores. In addition, VSDA has an associate membership that includes the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

Sale and rental of video cassettes for home viewing is a large and rapidly growing industry. A great many kinds of works—including motion picture films, sporting events, documentaries, musical productions and education aids—are recorded on video cassettes. VSDA members purchase the cassettes and keep them in inventory for sale or rental to their customers. Since the vast majority of retail transactions are rentals, rather than sales, the inventory of a typical video dealer often has only one or two copies of many of the cassettes in stock.

Video cassettes have become a highly desirable and socially-acceptable form of expression that gives individual consumers freedom to choose that which they decide is suitable for viewing in the privacy of their homes. VSDA believes that, under the Constitution of the United States, the American people must be permitted to exercise this freedom to the fullest. The position advanced by petitioner in this case, however, would permit judicial officers responsible for upholding the requirements for lawful warrants to abandon this important responsibility and leave in the hands of local police investigators effective power to decide which films depicting sexual acts may be privately

viewed. The New York courts below rejected petitioner's position. VSDA believes that the position also should be rejected by this Court.

STATEMENT

Network Video, a video store operated by respondent P.J. Video, Inc. in Depew, New York, was visited on November 22, 1983, by a police officer with a warrant commanding the search for and seizure of ten video cassette movies. Pet. A-71 to A-72.[1] The warrant had been issued the previous day upon affidavits executed by Detective Sergeant Vincent F. Constanza of the Erie County Sheriff's Department ("Constanza") and Investigator David J. Groblewski of the Erie County District Attorney's Office ("Groblewski"). Pet. A-43 to A-44.

The Constanza affidavit merely identified five "sound video cassette movies" that Constanza had rented from Network Video and its owner, respondent James Erhardt ("Erhardt") and five additional cassettes that were on a list that Constanza had obtained from Erhardt containing titles of "adult movie cassette movies available for rental from Network Video." *Id.* Although his affidavit affirmed that Constanza was "familiar with the aforesaid video cassette movies" (Pet. A-46), the affidavit contained no information concerning the content of any of the films in the ten cassettes. Regarding the content of these films, the affidavit stated merely that the cassettes had been "previously reviewed by Investigator David

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[1]Citations in the form "Pet. A-___" refer to pages in the apppendices to the Petition for a Writ of Certiorari to the New York State Court of Appeals, filed with the Court on August 30, 1985.

Groblewski," whose affidavits "detailing the content of each of the aforesaid video cassette movies are annexed as exhibits. . . ." Pet. A-46.

Annexed to Constanza's affidavit were ten affidavits executed by Groblewski, who identified himself as a "Confidential Criminal Investigator assigned to the Erie County District Attorney's Office" and a former member of the New York State Police for "approximately 25 years." Pet. A-48. Each of the ten affidavits deals with a film that Groblewski had viewed during the period from September 9 to October 6, 1983—six to ten weeks prior to the date the affidavits were executed. The format in all ten affidavits is the same. The date on which Groblewski viewed the cassette in question is given, the length of time taken for the viewing is stated, and the "content and character" of the film is portrayed by a statement of various sexual acts performed by the characters in the film, who usually are identified merely as "white males" and "white females." Pet. A-48 to A-67.

None of the Groblewski affidavits state that any of the sexual acts he viewed on the video cassette films are depicted in a manner that is offensive—either to Groblewski or to the average person applying the contemporary standards of any community in which the video cassettes were found. Moreover, the affidavits nowhere mention whether the films have any literary, artistic, political or scientific value, and the affidavits give no assessment of the predominant appeal of the video cassette movies Groblewski viewed. In fact, the Groblewski affidavits contain nothing inconsistent with the thesis that Groblewski himself regarded the films as inoffensive works of

serious artistic value that provoke only normal, healthy sexual desires.

The police officer who executed the warrant seized thirteen cassettes, containing eight of the ten films in the Groblewski affidavits.[2] Based upon the seizure of these cassettes, charges of obscenity in violation of the New York Penal Law were brought against respondents in the Village of Depew Village Court. On respondents' motion, however, that court ordered that the prosecutor be "restrained and precluded from using" any of the seized video cassettes as evidence in support of the charges. Focusing upon the Groblewski affidavits, the only information in the record of the content of the seized cassette films, the Depew Village Court observed as follows:

> A review of these documents shows him to be a retired State Trooper who diligently and assiduously reviewed the various cassettes for evidence of intercourse and other assorted sexual activities which he scrupulously recited. He obviously paid no attention to contemporary community standards, made no determination if the depicted acts were of-

---

[2]The return listed the following inventory of seized cassettes:

Taboo (2 copies)
Body Magic (1 copy)
Filthy Rich (1 copy)
Little Girl Blue (2 copies)
Deep Throat (2 copies)
Taboo II (2 copies)
All American Girls (2 copies)
Every Which Way She Can (1 copy)

Pet. A-71.

> fensive and made no further determination if the presentations had any literary, artistic, political or scientific value.

Pet. A-36 to A-37.

Although the Village Court opinion alluded to this Court's decision in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), the court found that for its decision it "need[ed] to confine [itself] only to New York State decisions" (Pet. A-37), and based its suppression of the cassettes as evidence on decisions of the New York Court of Appeals in *People v. Potwora*, 48 N.Y.2d 91, 397 N.E.2d 361 (1979), *People v. Abronovitz*, 31 N.Y.2d 160, 286 N.E.2d 721 (1972) and *People v. Rothenberg*, 20 N.Y.2d 35, 228 N.E.2d 379 (1967). This ruling was affirmed, first, by the Erie County Court (Pet. A-30 to A-34) and thereafter by the New York Court of Appeals (Pet. A-1 to A-29).

ARGUMENT

The Affidavits Upon Which The Warrants In The Instant Case Were Issued Provided The Issuing Officer With No Substantial Basis For Concluding That The Seized Cassettes Contain Films That Are Obscene

The warrant issued in the instant case commanded a police officer to seize ten video cassette films, which the judicial officer issuing the warrant "believed to be obscene in violation of § 235.05 [sub 1] of the New York State Penal Law." Pet. A-69. The definition of "obscenity" for that statute, like most state definitions of obscenity, is patterned on the Court's holding in *Miller v. California*, 413 U.S. 15 (1973). It thus has the following three essential elements:

> (a) the average person, applying contemporary community standards, would find that

> considered as a whole [a work's] predominent appeal is to the prurient interest in sex, and
>
> (b) [the work] depicts or describes in a patently offensive manner actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and
>
> (c) considered as a whole, [the work] lacks serious literary, artistic, political, and scientific value.

N.Y. Penal Law 235.00.

As this definition demonstrates—and as the Court has repeatedly stressed—"sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476 (1957). The "portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.* at 487; *see also Kois v. Wisconsin*, 408 U.S. 229, 231 (1972); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). A work that depicts sexual conduct is a form of expression that is entitled to the full protection of the First Amendment. Governmental interference with dissemination of such a work can be constitutional only if the work not only depicts sexual conduct but also has the three above-quoted characteristics incorporated in the New York obscenity law. *Miller v. California* 413 U.S. 15 (1973).

One of the important constitutional protections for works depicting sexual conduct is the set of "particularized rules applicable to searches for and seizures of allegedly obscene films, books, and papers." *Maryland v. Macon*, ___ U.S. ___, 105 S.Ct. 2778, 2781-2782 (1985). As the Court pointed out almost twenty-

five years ago in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.* at 729; *see also Stanford v. Texas*, 379 U.S. 476, 482-486 (1965). For this reason, "[t]he First Amendment imposes special constraints on searches for and seizures of presumptively protected material, and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances." *Maryland v. Macon*, 105 S. Ct. at 2781, citations omitted. The Court has squarely held that a judicial officer, before issuing a warrant commanding the seizure of a motion picture, must employ a "procedure 'designed to focus searchingly on the question of obscenity.' " *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968), quoting *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961).

The warrant issued in the instant case went beyond the special constraints imposed by the First Amendment, because the affidavits upon which the warrant was issued provided no means by which the issuing officer could "focus searchingly on the question of obscenity." *Marcus v. Search Warrant*, 367 U.S. at 732.[3] In fact, even apart from First Amendment con-

[3]Petitioner appears to contend at one place in its brief that the *Marcus* case is distinguishable from the instant case on the ground that *Marcus* involved a mass seizure and the instant case does not. Brief for Petitioner at 18. Petitioner nonetheless concedes that, even in the instant case, "the tenor of this Court's decisions" is that the affidavits must be "adequate to allow the magistrate to focus searchingly on the question of obscenity." *Id.* at 20. Moreover, the distinction petitioner would draw is meaningless. As is demonstrated *infra*, p. 13, a seizure of the

siderations, those affidavits would be constitutionally deficient. Regardless of the nature of the items to be seized, "[a]n affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). The affidavits in the instant case support none of the three elements essential for any determination of probable obscenity and thus did not present "[s]ufficient information . . . to the magistrate to allow that official to determine probable cause." *Id.*

A mere recounting of sexual conduct that appears in some form in a filmed work provides no basis for even a probable conclusion that the work, taken as a whole, appeals to the prurient interest and thus meets the first criterion for obscenity. Only last June, the Court condemned a Washington statute that defined "prurient" to include "that which incites lasciviousness or lust" (Wash. Rev. Code § 7.48A.010(8)). *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985). "Material that provoke[s] only normal, healthy sexual desires" does not appeal to the prurient interest and thus cannot be deemed obscene. *Id.* at 2799.

The affidavits supporting the warrant in the instant case state only that certain sexual conduct—all of which also is listed in the Washington statute at issue in the *Spokane Arcades* case (Wash. Rev. Stat. 7.48A.020(2)(b))—appears in the filmed works. As the

kind made in this case interferes with the dissemination of presumptively protected materials no less than the "mass seizures" in *Marcus*, and, as the holdings in *Maryland v. Macon*, 105 S. Ct. 2778, and *Lee Art Theatre v. Virginia*, 392 U.S. 636, demonstrate, the Court has not limited the *Marcus* principles solely to cases of "mass seizures."

Court reasoned in *Spokane Arcades*, however, prurient appeal is different from depiction of statutorily-defined sexual conduct even if the conduct is depicted in a patently offensive way and is lacking in serious literary or artistic value. *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2800. The element of prurient appeal is an independent element that is present only if a work predominantly appeals to a "shameful or morbid interest in nudity, sex or excretion." *Brockett v. Spokane Arcades*, 105 S. Ct. at 2799. The element cannot be presumed simply because sexual acts are depicted.

The affidavits in the instant case also fail to provide any basis for finding probable existence of the second element of the New York law's definition—depiction of specifically-defined sexual conduct in a patently offensive way. The affidavits, for the most part, do not even disclose the way in which the sexual conduct is depicted in the films under review. They merely state, for example, that characters portrayed in the film "become involved in sexual acts of intercourse and fellatio" (Pet. A-60) or "are involved in love-making, fondling and cunnilingus" (Pet. A-52).[4] There

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[4]Petitioner's reliance (see Brief for Petitioner at 13) upon the lower court's characterization of the sexual activity described in Groblewski's affidavits as "patently offensive by any constitutional standard" (Pet. A-6; *see also id.* at A-5) is misplaced. The second element of the *Miller* obscenity test does not turn on the offensiveness of the sexual activity depicted but on the offensiveness of the way in which it is depicted. *Miller v. California*, 413 U.S. at 24; *see also id.* at 5. The distinction is important. Under the *Miller* standard even the most offensive sexual conduct imaginable can be described or depicted in a way that is not patently offensive. The view of the court below as to the offensiveness of the sexual conduct itself, as opposed to the way it is depicted, thus is immaterial.

often is no indication in the affidavits that the film contains an "exhibition of the actors' genitals, lewd or otherwise" (compare *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974)) during scenes of sexual conduct depicted in the films. The affidavits thus, for the most part, leave open the question whether the sexual conduct in the films is explicitly shown or merely "understood to be taking place." *Id.*

Regarding the third element necessary for any constitutional finding of obscenity—lack of serious literary, artistic, political or scientific value of the work taken as a whole—the affidavits in the instant case again fall short of providing any substantial basis for a finding of probable cause. The affidavits give only a vague notion of the context in which the sexual conduct they recount occurs in the films. They nowhere mention the films' point of view (or lack thereof), their dialogue (or lack thereof), their value (or lack thereof) as comedy, educational material, social or political commentary or moral teaching. In fact, the affidavits do not even purport to give a description of the entire filmed works. There thus is no basis upon which any conclusion can be formed concerning the probable value or lack of value these films might have as works of art, literature, politics or science.

Petitioner's own description of the Groblewski affidavits betrays their shortcomings. While petitioner points out that certain sexual acts "dominate the descriptions of the films reviewed" (Brief for Petitioner at 13), petitioner does not—and cannot—claim that the affidavits state that the acts dominate the content of the films themselves. Petitioner attempts to shore up its position by attempting to draw inferences from

the film's titles, the use of the word "throughout" in two of the ten affidavits and the fact that the films were advertised as "adult" films. *Id.*at 14. None of these factors, however, can supply that which the affidavits do not provide—a substantial basis for any determination of probable cause. And petitioner's effort to draw inferences from the fact that the affidavits do not affirmatively reveal that the films in question "contributed anything of value to art, literature, politics or science" (*id.*) confounds the procedure required by the constitution for issuance of warrants. "Sufficient information *must be presented to the magistrate* to allow that official to determine probable cause." *Illinois v. Gates*, 462 U.S. at 239 (emphasis added). The magistrate may not indulge the illogical presumption that the affiant's failure to address an essential element of the alleged crime somehow means that evidence to support the element exists.

The judiciary has important responsibilities in protecting the freedoms spelled out in the Bill of Rights. In *Miller*, the Court recognized that appellate courts often must conduct an independent review of jury findings of obscenity. *Miller v. California*, 413 U.S.at 25; *see also Bose Corp. v. Consumers Union of United States*, 104 S.Ct. 1949 (1984). In *Jenkins v. Georgia*, the Court conducted such a review and held that "[o]ur own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." 418 U.S. at 161. It is not sufficient, however, for the courts to wait until the last stages of an obscenity case to take an active role in determining whether or not the challenged work is constitutionally protected. It is far more important for judicial officers to discharge their responsibilities at the initial stages so that warrants issued under the power of the court are not employed by the political arms of government to chill unpopular expression.

The important protection historically afforded by the requirement that law enforcement officers present evidence of probable cause to a "neutral and detached magistrate" (*Johnson v. United States*, 333 U.S. 10, 14 (1948)) is vital when First Amendment interests are threatened. A retailer's knowledge that a warrant has been issued for a particular cassette may itself satisfy the relaxed *scienter* requirements in many state obscenity laws, under which misdemeanors, and possibly felonies, can be found upon a showing that a seller of obscene material "has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." *See e.g., Sewell v.State*, 238 Ga. 495, 233 S.E.2d 187 (1977), *dismissed for want of sub. fed. question*, 435 U.S. 982 (1978). The issuance of a warrant for a video cassette film thus is a governmental act that has serious consequences beyond merely obtaining and preserving evidence. Issuance of a warrant itself significantly increases the legal risk for those who might otherwise distribute other copies of the seized cassette and thus creates a serious impediment to further dissemination of other copies of the seized cassette.

The constitutional definition of obscenity and the vital importance "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a

manner appealing to the prurient interest" (*Roth*, 354 U.S.at 488) mandate that a judicial officer requested to authorize seizure of a filmed work of expression become sufficiently familiar with the entire work so that he can evalute the work's predominent appeal, its offensiveness and its literary or artistic value. In *Lee Art Theatre*, 392 U.S.636, the Court expressly left open the question "whether the justice of the peace should have viewed the motion picture before issuing the warrant" instead of relying upon an affidavit describing the film. *Id.* at 637; *see also Heller v. New York*, 413 U.S. 483, 488 (1973). Any proper evaluation for probable obscenity, however, would appear to require the judicial officer to consider not only the general content of a film, but also nuances that an affidavit could hardly convey—except perhaps in the form of subjective impressions and conclusions on which the judicial officer may not rely. *Lee Art Theatre*, 392 U.S. 636; *Marcus*, 367 U.S. 717. In addition, although, as petitioner points out (Brief for Petitioner at 22-23), some lower court decisions have upheld search warrants issued for films even though the issuing officer had not viewed the film, there is no doubt that by choosing what to include in an affidavit the affiant "can manipulate the inferences a magistrate will draw." *United States v. Stanert*, 762 F. 2d 775 (9th Cir. 1985).[5] The First Amendment

[5]The affidavits in the cases cited by petitioner appear to have provided the magistrate with considerably more detail than the Groblewski affidavits contain. *See, e.g. Sequoia Books, Inc. v. McDonald*, 725 F. 2d 1091, 1093 (7th Cir.), cert.denied, 105 S.Ct.83 (1984). ("detailed affidavit . . . which described [seized materials] in minute and indeed rather disgusting detail. . . ."); *United States v. Middleton*, 599 F.2d 1349, 1351-1354 (5th Cir. 1979); *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1368-1369 (D.C. Cir. 1975) ("affidavit is a lengthy account of the film, describing each scene in detail and with explicit language").

interests at stake are too important and the judgment a magistrate must make is too significant for that judgment to be based upon a police investigator's affidavit, even if the affidavit provides more information than those in this case. The judicial officer can fulfill his constitutional responsibility only by viewing the film to determine whether there is probable cause to find that the stringent criteria for obscenity have been met in the film that the police officers wish to seize.

CONCLUSION

For the reasons stated, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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January 6, 1986